

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555(JMP)

Adv. Case No. 08-01420(JMP)(SIPA)

Adv. Case No. 09-01480

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.,

Debtors.

- - - - -x

SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff-Appellant,

-against-

LEHMAN BROTHERS INC.,

Defendant.

- - - - -x

PT BANK NEGARA Indonesia (PERSERO) TBK,

Plaintiff,

-against-

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Defendant.

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U.S. Bankruptcy Court
One Bowling Green
New York, New York

December 16, 2009
10:02 AM

B E F O R E:
HON. JAMES M. PECK
U.S. BANKRUPTCY JUDGE

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HEARING re Fee Committee Final Recommendations for Second
Interim Applications

HEARING re LBHI's Motion for Authorization to Make a Capital
Contribution to Aurora Bank

HEARING re Debtors' Motion for Approval of a Settlement
Agreement Among Lehman Brothers Special Financing Inc.,
American Family Life Assurance Company of Columbus, and Others,
Relating to Certain Swap Transactions with Beryl Finance
Limited

HEARING re Motion of The TAARP Group, LLP Authorizing and
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9006(b)(1)

HEARING re Debtors' Motion Pursuant to Rule 1015(b) of the
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Administration of Merit, LLC's Chapter 11 Case

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HEARING re Debtors' Motion for a Determination that Certain
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11 Case of Merit, LLC

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HEARING re Motion of Banesco Banco Universal Requiring Lehman
Brothers Holdings Inc. to Provide Requested Information and to
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Date

HEARING re Motion of Pacific Life Insurance Company to File
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HEARING re Motion of PB Capital to Include Certain European
Medium Term Notes in the Lehman Program Securities List or,
Alternatively, to Deem Such Claims to be Timely Filed by the
Securities Programs Bar Date

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HEARING re Debtors' Motion for Authorization to Implement the
Derivatives Employee Incentive Program

HEARING re Debtors' Motion for an Order Approving Settlements
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Ltd.

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SECURITIES INVESTOR PROTECTION CORPORATION PROCEEDINGS:
HEARING re Motion for Order Approving Trustee's Allocation of
Property of the Estate

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2 HEARING re California Public Employees Retirement Systems'
3 Motion for Relief from the Automatic Stay to Effect Setoff
4 against LBI Funds Currently Held by Securities Finance Trust
5 Company

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7 PRE-TRIAL CONFERENCE re PT Bank Negara Indonesia (Persero) Tbk
8 v. Lehman Brothers Special Financing,
9 Inc.

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12 Trustee and the Committee Based on Privilege Waiver filed by
13 Hamish Hume on behalf of Barclays Capital, Inc.

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15 HEARING re Motion of Official Committee of Unsecured Creditors
16 of Lehman Brothers Holdings Inc., et al. for Letters of Request
17 for International Judicial Assistance

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24 Transcribed by: Clara Rubin
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P R O C E E D I N G S

THE COURT: Be seated, please.

MR. FAIL: Good morning, Your Honor. Garrett Fail, Weil, Gotshal & Manges, for Lehman Brothers Holdings, Inc., and its affiliated debtors. There are a number of items on the agenda this morning. Unless the Court prefers otherwise, we'll take them in the order that they appeared on the agenda.

THE COURT: Let's do that.

MR. FAIL: Thank you, Your Honor. And with respect to motions on stipulations of the debtors that would be presented, I proposed that we just submit them, to the extent granted, at the end of this morning's calendar.

THE COURT: Fine.

MR. FAIL: Thank you. Your Honor, the first item on the agenda is a case conference with respect to the final -- the fee committee final recommendations with respect to second interim fee applications.

THE COURT: Now a contested matter.

MR. FAIL: Somewhat, Your Honor. I'll turn the podium over to Mr. Velez-Rivera, or anyone else for the fee committee.

MR. VELEZ-RIVERA: Your Honor, just a very brief series of remarks. The fee committee has gone through the second wave of fee applications twice. It has filed its report with additional guidelines with which the Weil Gotshal firm seems to have disagreed.

1 The fee committee hasn't had the opportunity to
2 deliberate on the document because it was filed only late last
3 night, but the U.S. Trustee's comments with respect thereto are
4 simply that the fee committee's recommendations are nothing --
5 are no more than that. There are recommendations as to a
6 series of deductions from fee applications, which the Court
7 revisits at the end of the case, and recommendations by the
8 very nature aren't punitive. The document also assumes a level
9 of arbitrariness that just isn't there.

10 The fee committee is a very deliberative body. It
11 makes recommendations, and in this particular instance, where
12 it proposes to make deductions, it makes them only -- it will
13 make them only to the extent it believes that documents and
14 materials should have been submitted with a fee application the
15 first time around.

16 The guideline to which Weil Gotshal is complaining
17 simply addresses a recurring difficulty that the fee committee
18 is having in reviewing applications. The same omissions and
19 the same shortcomings keep on arising in fee applications over
20 and over again. And this was the best method that the fee
21 committee could come up with to grapple with the problem.

22 That's all I have.

23 THE COURT: Well, I have a couple of comments, and I
24 don't have to deliberate with anybody about the objection filed
25 by Weil Gotshal; I read it and I reacted to it. And one of my

1 reactions is that I don't know enough about this process. The
2 last time the fee committee made a report, and I think I was
3 quite complimentary in my remarks from the bench about the work
4 about the committee, and I still am, I had requested that I
5 receive the same information that the fee committee receives in
6 terms of the oversight of professionals and the adjustments in
7 their fee applications. That hasn't happened. None of those
8 materials had been provided to chambers.

9 As a result, I find myself in the uncomfortable
10 position, and we're going to have to do something to fix it,
11 that I read your report literally within days of a hearing such
12 as this, and in the even more uncomfortable position of
13 receiving on the morning of the hearing an objection from Weil
14 Gotshal regarding their recommendations. I had no advance
15 notice that there would be recommendations, nor did I have any
16 advance notice that these would be controversial.

17 It seems to me, without getting into the substance of
18 the recommendations or the objections thereto, that I need more
19 visibility into this process than I have been given. And I'm
20 going to schedule a chambers conference. Mr. Feinberg will be
21 there, as will all members of the committee. I'm looking for
22 informal insights not available from the written report as to
23 how the committee is functioning, whether or not there are
24 material issues of concern with regard to the fee application
25 review process, whether or not this is efficient or inefficient

1 in the way it's being managed, and I want an opportunity for
2 Weil Gotshal and perhaps the creditors' committee lawyers, as
3 representatives of those professionals who submit fee
4 applications, to be in attendance at this meeting as well. I'd
5 like this to be a candid off-the-record review as to whether or
6 not this is working, and if it isn't, what we can do to make it
7 better.

8 MR. VELEZ-RIVERA: That's good, Your Honor.

9 THE COURT: We'll do that in January.

10 MR. VELEZ-RIVERA: Okay.

11 THE COURT: What I'm going to suggest is that you meet
12 and confer on the phone with members of the committee to
13 determine some dates that are workable. This will be an in-
14 person meeting.

15 MR. VELEZ-RIVERA: We will do that.

16 THE COURT: Okay.

17 MR. VELEZ-RIVERA: Thanks, Judge.

18 THE COURT: Thank you. Oh, and by the way, I accept
19 the report and appreciate the fact that there were significant
20 consensual reductions in the fees applicable to this interim
21 period based upon the work of the committee.

22 MR. VELEZ-RIVERA: Thank you.

23 MR. PEREZ: Good morning, Your Honor. Alfredo Perez.
24 I'm here on the next matter, which is LBHI's motion for
25 authority to make a capital contribution to Aurora Bank. It's

1 docket number 5956.

2 Your Honor, we did not have any objections to the
3 motion but, nevertheless, we thought it important to come down
4 and kind of tell the Court what's going on with this, because I
5 continue to come down here.

6 THE COURT: This is funding by a thousand cuts.

7 MR. PEREZ: Well, Your Honor, it may be, and I hope
8 the Court doesn't perceive it that way, but I think we're very
9 close to a --

10 THE COURT: Well, I guess I do perceive it that way,
11 because I just said it.

12 MR. PEREZ: Understood, Your Honor. And I think we
13 are in advanced discussions -- the bank is advanced discussions
14 with the regulators; they've submitted a business plan. And I
15 think that -- I would hope, well, that the next time I'm
16 here -- and we intend to file a motion as soon as we have a
17 deal on the table, which would resolve the issue, at least for
18 the foreseeable future. This has been a very difficult
19 process. There's no great solutions here. Because the banks
20 have mark-to-market accounting or fair value accounting, we're
21 subject to the vagaries of the market.

22 The particular issue today was occasioned by a mistake
23 in the calculation of the RFC master servicing rights and a
24 result of some changes in the fair value of the assets. So we
25 wanted to make sure that there wasn't any issue that on 12/31

1 we're well-capitalized.

2 But that doesn't solve the long-term problem of both
3 Aurora and Woodlands Bank. This is something that -- Mr.
4 Lambert is here from Alvarez & Marsal; he spends full time
5 working on this, and a whole group of people additionally. The
6 creditors' committee has a whole subcommittee devoted to
7 working on these problems. Mr. Rosenberg is here representing
8 Aurora Bank. I mean, this is something that is at the highest
9 level in all of these institutions and trying to find a
10 solution.

11 As the Court is aware, I mean, we have been through
12 significant financial tumult, and the banks have not fared well
13 during this time period. Finding a solution is not going to be
14 an easy thing.

15 Just so the Court's aware, there are about six proofs
16 of claim filed both by the OTS and Aurora against LBHI,
17 totaling about three billion dollars. Some of those proofs of
18 claim have been filed as priority claims under 365(o). There
19 are approximately twenty-five proofs of claim filed by
20 Woodlands Bank against not only LBHI but LBSF and several of
21 the other entities.

22 The goal would be to have a resolution of all of the
23 claims and to be able to set ourselves up on a way where the
24 estate could realize the value out of these assets.

25 At this point, Your Honor, I wish I could go further,

1 but, I mean, there have been significant discussions, they're
2 at an advanced stage, and when they're done we'll file a motion
3 immediately to try to resolve the issue.

4 THE COURT: Okay. I've given what I assume is the
5 delicacy of those conversations, and the fact that we have a
6 very full courtroom, there's no need to go into this in further
7 detail. But can you give me any assurance as to whether this
8 is the end of the line in terms of emergency funding for these
9 institutions?

10 MR. PEREZ: Your Honor, based on what I know as of
11 this morning, and literally there have been proposals exchanged
12 as late as Friday, I believe that the next pleading that we
13 file, hopefully before the end of the year, will be a
14 comprehensive resolution. But, Your Honor, I can't in good
15 faith say absolutely; I just can't -- I can't in good faith.
16 Based on everything I know, that's the case, but I just
17 couldn't -- I just don't know enough, and certainly I have no
18 control over, you know, two of the three, or three of the four
19 parties. I mean, I have control over LBHI. I don't have
20 control over either bank; I don't have control over the OTS or
21 the FDIC or any other governmental agency that might be
22 involved.

23 So it's -- I can make a good-faith representation that
24 based on everything I know as of Friday that hopefully the next
25 piece of paper is the last one.

1 THE COURT: Okay. I mean, this is an uncontested
2 motion. I would be encouraged to hear that the creditors'
3 committee has reviewed it and is satisfied that this funding is
4 in the best interests of the estate.

5 MR. O'DONNELL: Your Honor, Dennis O'Donnell of
6 Milbank, Tweed, Hadley & McCloy, on behalf the creditors'
7 committee. In answer to your question, Your Honor, is yes, the
8 committee has been, and continues to be, intimately involved in
9 the ongoing negotiations with the regulators over a global
10 resolution. This is stop-gap measure. I mean, it's -- I agree
11 where the perception is to easily perceive this death by a
12 thousand cuts. But this should be the last cut before a global
13 resolution, if we can get to a global resolution, which we
14 agree with Mr. Perez's representations that we think before the
15 end of the year is a possibility. We can't guarantee that; we
16 don't control the regulators. But all indications are that
17 we're moving with a momentum and direction that we have had --
18 not had previously, hopefully towards a global resolution.

19 THE COURT: Okay, and just so I'm clear -- this is
20 really a question for Mr. Perez, if he has the data. From the
21 beginning of this process through today, what's the total in
22 advances made to Aurora?

23 MR. PEREZ: I do have that data, Your Honor. Your
24 Honor, we have foregone ninety-nine million in disputed serving
25 fees. So in other words, these were servicing fees that they

1 had that they claimed they owed, that we claimed we owed, and
2 we gave them up. We had a capital contribution of 9,838,000
3 dollars on February 27th; a capital contribution of 15,000,000
4 dollars on March 31st; a capital contribution of 50,000,000
5 dollars on June 30th. We had the MSR rights, which at the time
6 were valued at 171-; they're 50 million dollars lower; hence,
7 the reason for the motion today. And in addition, Your Honor,
8 we were able to reduce loan commitments which were held as
9 reserves against them at a 100 percent of a 1,357,000,000, at
10 really minimal cost; there might have been some cost to
11 reducing the loan commitments.

12 So that's what -- and then in addition to that, Your
13 Honor, we have provided two financings, which are advanced and
14 repaid: one of 450-, one of 500 million. Those are kind of
15 temporary liquidity facilities. That's what we've done with
16 respect to Aurora.

17 With respect to Woodlands, as the Court will recall,
18 there was a disputed asset on the books, some municipal bonds,
19 and against that we advanced 200 million dollars.

20 THE COURT: And today's measure will do what?

21 MR. PEREZ: Today's measure, Your Honor, will increase
22 the capital of Aurora so that it will be over the ten percent
23 well-capitalized. We're -- there's a concern that it's going
24 to be under that at 12/31.

25 THE COURT: And how much money is -- are we talking

1 about that will be going into Aurora?

2 MR. PEREZ: Today, a hundred million, Your Honor.

3 THE COURT: Hundred million today?

4 MR. PEREZ: Yes, Your Honor.

5 THE COURT: Okay.

6 MR. PEREZ: Thank you, Your Honor.

7 THE COURT: Motion's approved.

8 MR. PEREZ: May I be excused?

9 THE COURT: You may be excused.

10 MR. PEREZ: Thank you.

11 MR. GRUENBERGER: Good morning, Your Honor. Peter
12 Gruenberger, Weil, Gotshal & Manges, for the debtors, on docket
13 number 5955.

14 We are pleased to inform the Court that no objections
15 have been filed to debtors' motion under Bankruptcy Rule 9019
16 for approval of the settlement between LBSF, AFLAC and others
17 regarding to the Beryl notes program that Your Honor's familiar
18 with.

19 Ordinarily, we'd have just filed a certificate of no
20 objections and handed up the order. That order will be handed
21 up at the end of the hearing by my colleague Mr. Singh, but
22 we -- the reason we didn't just file the certificate is that
23 all parties to the settlement wanted Your Honor to be aware of
24 the fact that there is a timing issue that exists relating to
25 when Your Honor signs the order. Because of applicable

1 accounting rules, AFLAC is required, as I understand it, to
2 close this -- or book this deal anyway as a filed settlement
3 before the end of the calendar year 2009.

4 And so we all wanted to make it explicit to Your Honor
5 that we hope Your Honor can find the time to sign it, today
6 being December 16th, before the end of the year so AFLAC can
7 accomplish that end. And so that order will be handed up at
8 the conclusion of this morning's hearing.

9 THE COURT: That conveys the impression that I'm tardy
10 in the entry of my orders.

11 MR. GRUENBERGER: No, Your Honor, I just want to give
12 a holiday present, that's all.

13 THE COURT: Okay. Thanks very much. There'll be no
14 trouble, at least on my side, in being able to promptly enter
15 the order. I'm familiar with the circumstances of the
16 settlement as a result not only of the motion but certain
17 chambers conferences that we've had concerning the process and
18 procedure of reaching a settlement. And I'm pleased with the
19 outcome and I'm happy to approve it.

20 MR. GRUENBERGER: Thank you, Your Honor.

21 MR. FAIL: Good morning again, Your Honor. Garrett
22 Fail, Weil Gotshal, for the debtors.

23 Returning briefly to the first item on the agenda and
24 the fee committee and the case conference on the fee
25 committee's final recommendation, just a point of

1 clarification. Whether or not the Court was going to address
2 the recommendations with respect to the second interim
3 applications, I'm aware that there are parties who came today
4 prepared to address those recommendations. Weil Gotshal, as
5 noted in our report, agreed, but there are other professionals
6 who are here that didn't. So the question is whether or not
7 the Court preferred to adjourn till after the status conference
8 or address those today.

9 THE COURT: Well, maybe I don't understand what you've
10 just said. I thought that the case conference on the final
11 recommendations was just that, a conference, and that we've
12 moved on. Are there people who wish to circle back to that now
13 to be heard in connection with the fee committee
14 recommendation?

15 I hope the answer's no.

16 MR. FAIL: Your Honor, I think there were some that --
17 some professionals who thought that the Court may rule on the
18 second interim applications, but it's clear that today -- it
19 seems clear now that today was just a status conference and
20 that the Court will address final recommendations on the second
21 interim applications after the status conference in January.
22 There was a ten percent holdback, Your Honor.

23 THE COURT: There's a ten percent holdback; there's a
24 recommendation in the committee report that that holdback be
25 finalized by virtue of the final recommendations. If you're

1 looking for a so-ordered that that can be done, I can do that,
2 but it's not part of the agenda.

3 MR. FAIL: Thank you, Your Honor.

4 THE COURT: Do you want that done?

5 Do the professionals want that done as a Christmas
6 present?

7 MR. FAIL: Unfortunately, Your Honor, that's why I
8 mentioned that there were professionals here today who did not
9 agree with the final recommendations. While some professionals
10 may enjoy the Christmas present, others wouldn't -- would like
11 to return it probably after they opened it.

12 MR. DUNNE: Your Honor, may I be heard? It's Dennis
13 Dunne from Milbank Tweed, on behalf of the committee. The
14 committee agrees with what Your Honor proposed. If we could
15 actually take you up on the so-ordered with respect to the
16 holdback portion, have the case conference in January. We view
17 a lot of what's in that -- the fee committee's report as being
18 prospective and applicable to the third fee application as
19 well --

20 THE COURT: So do I.

21 MR. DUNNE: -- particularly with respect to what Weil
22 Gotshal filed last night. And we have some of the same issues
23 that we think we can resolve in a case conference like that. I
24 think the only matter for consideration now is the ten percent
25 holdback. And we would enjoy the holiday gift, Your Honor.

1 THE COURT: The ten percent holdback may be treated as
2 paid to those professionals, subject to deductions for the
3 adjustments that have been reflected in the committee final
4 recommendations. And to the extent that there's a need for a
5 more formal order than what I just did, which I so order that,
6 you can submit a piece of paper which I will enter as promptly
7 as I enter the AFLAC settlement approval. If that's not
8 necessary, then you can simply rely upon this transcript.

9 MR. FAIL: Thank you, Your Honor. Weil Gotshal will
10 discuss with the members of the fee committee and circulate to
11 the relevant professionals before it submits an order to the
12 Court.

13 THE COURT: Okay.

14 MR. FAIL: Your Honor, moving to item 4 on the agenda
15 is a motion filed by the TAARP Group authorizing and directing
16 payment of an administrative expense claim. Your Honor, TAARP
17 sought allowance of an administrative expense in excess of 1.4
18 million dollars. The parties have reached a stipulation and
19 would present it at the end of today's calendar, which would
20 provide TAARP with immediate payment of 50,000 dollars as an
21 administrative expense claim and allow the balance of the
22 amount as a general unsecured claim, the 50,000 dollars
23 representing the amount of work performed post-petition.

24 If the motion is unopposed, then we'd request the
25 Court approve the stipulation.

1 THE COURT: It's approved.

2 MR. FAIL: Thank you, Your Honor. The next motion is
3 the motion of Deutsche Bank AG to permit a late claim filing
4 pursuant to Bankruptcy Rule 9006(b)(1). After reviewing and
5 consulting with the creditors' committee, the debtors agreed
6 not to object to the proof of claim on the basis of
7 untimeliness but reserved rights to object to the claim on all
8 other grounds. And we would present a stipulation to reflect
9 that agreement as well.

10 THE COURT: Okay, that's approved.

11 MR. FAIL: Thank you, Your Honor. The next items on
12 the agenda are first-day motions with respect to Merit, LLC.
13 Merit, LLC filed a petition in this court on Monday the 14th of
14 December. Merit, LLC is a derivatives-related single-purpose
15 entity wholly owned by Lehman Commercial Paper Inc., a debtor
16 in these Chapter 11 cases. The filing was done after notice
17 and consultation with the majority of material creditors from
18 Merit, LLC. The majority of those are current and former
19 affiliates of these debtors and of Merit, LLC.

20 The three motions on the calendar today are standard
21 orders: the first requests joint administration along with the
22 other jointly administered cases.

23 THE COURT: I just have a question.

24 MR. FAIL: Yes, sir.

25 THE COURT: What prompted the filing at this juncture?

1 MR. FAIL: Your Honor, Merit, LLC filed, after
2 consultation with its independent manager, to preserve the
3 value of certain of its assets and to protect and hopefully
4 enhance its ability to liquidate certain of its assets.

5 THE COURT: Okay, that was sufficiently opaque that I
6 don't understand it.

7 MR. FAIL: Should I clarify or move on, Your Honor?

8 THE COURT: I'd just like to know why they filed now.

9 MR. FAIL: You'd like to know? Merit, LLC has amongst
10 its assets certain shares of third-party stock and certain
11 contractual rights that it believes it has the right to
12 exercise in connection with a put option. And all parties --
13 or -- and Merit, LLC believes that negotiations with the
14 counterparty --

15 (Pause)

16 MR. FAIL: And, Your Honor, there are ongoing
17 discussions and negotiations, and there may be disputes with
18 certain parties around those. And to enhance the benefit and
19 protect its assets, Merit, LLC commenced the Chapter 11 case
20 last Monday.

21 THE COURT: Okay.

22 MR. FAIL: Your Honor, the first -- the next motion,
23 as I mentioned, was for joint administration with these cases.
24 The second motion is an all-orders motion applying for
25 administrative use and efficiencies, orders that apply to all

1 debtors in these cases to Merit, LLC's Chapter 11 case. It
2 excluded the bar date motion and a motion to extend the time
3 for the current debtors to file schedules.

4 The third motion, then, is a motion to extend the
5 debtors' -- Merit, LLC's time to file schedules in additional
6 thirty days, through January 27th. Merit, LLC believes that
7 it's able to meet that deadline, and we'll be filing by that
8 point.

9 THE COURT: Okay. I mean, these are entirely standard
10 first-day motions, there are no objections, and they're all
11 approved.

12 MR. FAIL: Thank you, Your Honor. Your Honor, my
13 colleague David Fertig will address the next matter on the
14 calendar.

15 MR. FERTIG: Good morning, Your Honor. David Fertig
16 from Weil Gotshal, on behalf of debtors LBHI and LBSF. Your
17 Honor, we're here this morning on CalPERS's motion for stay
18 relief filed against LBHI and LBSF, the hearing of which is
19 tentatively scheduled to take place on the next omnibus hearing
20 in January of the new year.

21 Before we get started, we can be brief; this is just a
22 status conference, but before we get started I wanted to alert
23 Your Honor to the fact that on the agenda as well, item number
24 19, is a similar motion filed by CalPERS for setoff -- for a
25 stay relief to exercise a setoff in the case of LBI. So we've

1 invited Mr. Brundige up from Hughes Hubbard so that if Your
2 Honor wishes to hear anything from him following this, you can
3 consider the issues together.

4 THE COURT: So this is a twofer?

5 MR. FERTIG: It's a twofer. I think also, just for
6 the record, I believe we have counsel for CalPERS appearing
7 telephonically this morning, Mr. Felderstein from the
8 Felderstein Fitzgerald firm. Is he on?

9 THE COURT: Are you on the line, sir?

10 MR. FELDERSTEIN: Yes, I am. Thank you.

11 THE COURT: Okay.

12 MR. FERTIG: Your Honor, the parties thought it would
13 be useful to appear for a status conference here this morning,
14 really just for two limited purposes: the first, to update the
15 Court as to the status of CalPERS's motion and the briefing and
16 hearing schedule that has been agreed to by the parties; and
17 second, to make the Court aware of the parties' shared view
18 that, for purposes of the Court's planning in setting a hearing
19 date on the motion, that the CalPERS motion essentially raises
20 a threshold issue of law as to which no discovery is required
21 and no evidentiary hearing is necessary, so that the Court
22 would have advanced notice of the parties' belief that it would
23 be appropriate to move to oral argument on this issue of law at
24 the next time we're before Your Honor.

25 As Your Honor may recall, CalPERS's motion seeks an

1 order granting CalPERS relief from stay, for the sole purpose
2 of exercising a purported right of setoff by which CalPERS
3 seeks to offset an approximately 17 million dollar to LBSF,
4 representing a termination payment that's owed to LBSF in
5 respect of CalPERS's early termination of various derivative
6 transactions between LBSF and CalPERS against an approximately
7 430 million dollar claim that CalPERS has asserted not against
8 LBSF but against LBHI in respect of amounts that CalPERS
9 contends it's owed under certain pre-petition bonds that were
10 issued by LBHI.

11 As set forth in the debtors' objection which --- to
12 the motion, which we filed on November 24th, the debtors are
13 reserving their rights to challenge both the -- or to confirm
14 the proper amount of the termination payment owed by CalPERS to
15 LBSF, as well as to challenge the amount and validity of the
16 CalPERS claim in respect of the LBHI bonds, which -- and
17 likewise, it's my understanding from conversations with CalPERS
18 counsel last evening that CalPERS wishes to reserve its rights
19 with respect to the proper amount of the termination payment,
20 and more specifically any interest component that may be owing
21 on that.

22 But the parties are in agreement that there is a --
23 the motion raises a threshold and potentially dispositive legal
24 issue, and that is whether, under the circumstances, CalPERS's
25 debt to LBSF may be, as a matter of law, set off against

1 CalPERS's claims against LBHI under the bonds. And more
2 specifically the question is whether those debts can be
3 considered mutual as required for purposes of setoff under
4 Section 553 of the Bankruptcy Code and New York law.

5 It's debtors' position that those debts are not
6 mutual, because the CalPERS debt is owed to LBSF, whereas the
7 CalPERS alleged claim exists solely against LBHI. And CalPERS,
8 on the other hand, asserts that the requirement of mutuality is
9 either excused in its entirety or, alternatively, that
10 mutuality exists by virtue of the fact that LBHI guaranteed
11 certain of LBSF's obligations under the derivative transactions
12 that were terminated.

13 THE COURT: Is there any issue here of a master
14 netting agreement?

15 MR. FERTIG: I'm sorry? I didn't hear.

16 THE COURT: Is there any issue here of a master
17 netting agreement?

18 MR. FERTIG: No, Your Honor. There is a master -- and
19 is the master agreement in 1992, standard is the master
20 agreement that is in place. And that's one of the issues that
21 is raised and is briefed in the motion. It's the estate's
22 position that the -- that master agreement does not provide for
23 or permit nonmutual setoff or any setoff other than among the
24 parties to the swap agreement, LBH -- I'm sorry, LBSF and
25 CalPERS, but that's the only agreement that's in place.

1 THE COURT: Okay.

2 MR. FERTIG: So, Your Honor, that's essentially the
3 threshold legal issue on which the CalPERS motion turns and on
4 which the parties would wish to be heard at oral argument the
5 next time they're before this Court.

6 And so that brings me back to the other reason we
7 thought it would be useful to be here today, which is timing
8 and scheduling. As Your Honor may recall, the CalPERS motion
9 was originally filed in late August of this year. By consent
10 of the parties, however, the briefing and hearing schedule was
11 modified on two occasions, as reflected in notices of
12 adjournment that were filed on September 3rd and October 28th.

13 By consent of the parties, the debtors filed their
14 objection to the motion on November 24th, and CalPERS's reply
15 papers are due to be served on December 23rd, such that the
16 motion and this threshold legal issue I've been speaking about
17 will be fully briefed as of next week.

18 And so the parties just wish to advise the Court of
19 their desire to have argument on the motion in January, either
20 at the next omnibus hearing, which is the date for which we've
21 tentatively scheduled it, or, if more convenient for Your Honor
22 given the docket, what it looks like on the 13th, some other
23 date in January.

24 THE COURT: Let me ask this question of all counsel.
25 I accept the rendition of the facts and the law that you've

1 just presented, recognizing there may be some areas of
2 disagreement; it sounds like it's mostly a factual recitation.
3 I'm interested in knowing about how long counsel expect
4 argument to take on this. Is there any estimate as to how long
5 oral argument will last? If it's going to last more than, say,
6 forty-five minutes, it seems to me that this is a matter that
7 might be best heard on an adversary day when I tend to hear
8 matters at greater length than on the omnibus day. But if it's
9 going to be relatively brief, it can be heard on the next
10 omnibus day, which is January 13th.

11 MR. FERTIG: Your Honor, I certainly don't want to
12 speak for counsel for CalPERS.

13 THE COURT: That's why I'm asking everybody.

14 MR. FERTIG: You could hear from him in a moment. I
15 guess my reaction would be that I don't think that the issues
16 raised, which, again, we believe are issues of law, and I don't
17 believe there are disputed facts that are germane to that
18 issue, I think it's not a fairly complex one, I think the law
19 is fairly straightforward from the estate's perspective, and I
20 don't believe that we would need more than forty-five minutes
21 for argument, although I suppose I'm thinking more along the
22 lines of per party. It may be that if we're going to hear the
23 motions of LBI on the same date, then it might make sense to
24 have it on another day.

25 THE COURT: I think we should specially list it, based

1 upon that. And I don't know what my calendar looks like in
2 January for the Lehman case, other than the 13th, and I would
3 suggest that it be listed as if it were an adversary proceeding
4 and as if this were, in effect, a motion for summary judgment
5 with respect to an adversary proceeding. That way, we can
6 allocate sufficient time to it and we will not be delaying the
7 hearing of other matters on an omnibus day when so many other
8 lawyers are present.

9 MR. FERTIG: That's okay with me, Your Honor.

10 UNIDENTIFIED SPEAKER: I think that makes a lot of
11 sense, Your Honor.

12 THE COURT: Fine.

13 Is that all right with CalPERS?

14 MR. FELDERSTEIN: This is Steven Felderstein. I
15 agree.

16 THE COURT: Okay.

17 Well, everybody agrees with that, at least. I'll see
18 you in January on a day to be determined.

19 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

20 MR. FERTIG: Thank you, Your Honor.

21 MR. FELDERSTEIN: Thank you, Your Honor.

22 MR. WAISMAN: Good morning, Your Honor. Shai Waisman,
23 Weil, Gotshal & Manges, on behalf of the Lehman debtors. Your
24 Honor, the next three matters that appear on the calendar, as
25 Your Honor may recall, were the subject of disputes at the last

1 omnibus hearing. They were carried over to this calendar at
2 Your Honor's request for a status conference. So I'm not sure
3 anyone is prepared or is making a presentation other than to
4 have a status conference.

5 There have been two pleadings filed since the last
6 hearing; I can address those very briefly, or --

7 THE COURT: Why don't you address those very briefly.

8 MR. WAISMAN: Your Honor, the debtors filed a
9 supplement. Your Honor gave us the opportunity, because some
10 of the later-filed pleadings at the last hearing, to address
11 any of the points raised. We took the opportunity to file a
12 short pleading addressing some of what we felt were
13 misstatements that needed to be corrected but also to address
14 some of the statements that we had made -- that the debtors had
15 made representations regarding the number of claims and late
16 claims that have been filed, for which there was no evidence in
17 the record.

18 Yesterday we received from counsel to PB Capital a
19 motion requesting an opportunity to file a surreply. I think
20 the motion itself was the surreply.

21 THE COURT: Yes, it was. I read it.

22 MR. WAISMAN: And it attached and relied on an
23 affidavit. The affidavit made two points, as I recall, the
24 first point being that there is a proof of claim filed by a
25 party similarly situated to PB Capital. As to that proof of

1 claim, I would make two points. First, for a party similarly
2 situated to PB Capital, the counterparty, and I believe it was
3 DWS, or something similar to that, in fact understood that its
4 claim, having not been on the program securities list, was due
5 September 22nd and filed its claim on September 15th. So the
6 party similarly situated to PB Capital did in fact understand
7 the program, its responsibilities and the bar date.

8 Out of curiosity, because I looked at the proof of
9 claim that was attached and that was supposedly the proof of
10 claim filed by DWS, I went on to the docket and pulled the
11 claim -- or had a look at the claim, because the claim annexed
12 did not have the claims agent's notation that it was a filed
13 claim. The claim attached to the affidavit is in fact not the
14 proof of claim filed by DWS, claim 13735, and I have that claim
15 here with the claims agent's stamp; actually, September 16th
16 was the date it was filed, well in advance of the September
17 22nd bar date.

18 And the other point made was that a law clerk at
19 Cleary spoke to the client who spoke to some other party who
20 told them that they are in fact the third holder of the
21 security. I don't think I have to say much more; that doesn't
22 exactly comport with the evidentiary requirements in the
23 Federal Rules of Evidence.

24 Other than that, we have continued to receive requests
25 for late-filed claims. We consider each of them. As Your

1 Honor saw, Deutsche Bank, we felt, did merit leave to file a
2 late claim; circumstances were out of their control. We are
3 speaking to certain other parties who have similar
4 circumstances, and I expect that additional stipulations will
5 be filed. And we have since received additional motions for
6 leave to file late claims, at least one of which we will likely
7 oppose for the same reasons we oppose the PB Capital request.

8 THE COURT: Okay. Thanks for that update.

9 Here's what I'm going to do. I've decided this as to
10 Banesco Banco Universal and PB Capital. I have not decided it
11 as to Pacific Life Insurance Company. Given the fact that the
12 courtroom is quite crowded still and there are people standing
13 at this moment, I think it's unnecessary for me to spend the
14 time at this moment to read into the record my bench, but I'm
15 going to adjourn my bench ruling to this afternoon's calendar,
16 and those who might be interesting in hearing it can sit and
17 listen as I read it into the record as the last item today.

18 However, to the extent that people want to know
19 generally what I will be saying, I'm concluding that the two
20 that I have identified, Banesco Banco Universal and PB Capital
21 Corporation, have satisfied, at least in my judgment, the
22 standards of the Pioneer Investment Services v. Brunswick case
23 of the Supreme Court, and the Midland Cogeneration Venture
24 Limited Partnership v. Enron case of the Second Circuit, in
25 respect of a late-filed claim, and that they have convinced me

1 that, to the extent there is excusable neglect it's sufficient
2 to permit a late-filed claim here.

3 I'm still troubled by the Pacific Life Insurance
4 Company situation. I have analogized it in my mind to a fly
5 ball going into the outfield and two outfielders are calling
6 for it and it drops between them. It's clearly an error, and
7 it counts and runs score.

8 So is that excusable neglect? I'm really not sure.
9 And I think Pacific Life should do everything that it can to
10 cure procedures that are clearly deficient within its
11 organization. There is a level of inadvertence or incompetence
12 here that is embarrassing, and probably inexcusable. Whether
13 or not there is excusable neglect, however, under the
14 applicable standards is something I'm still considering. And
15 so I will defer my ruling with respect to that to another day.

16 I will read into the record a fairly well-developed
17 analysis as to Banesco and PB Capital this afternoon when only
18 those who are really interested in what I have to say will be
19 here to listen, if they wish, or they can simply order the
20 transcript.

21 MR. WAISMAN: Thank you, Your Honor. I will be here
22 this afternoon, as I am interested, but until then I have
23 nothing further on the calendar; I would just ask to be
24 excused.

25 THE COURT: You may be excused until this afternoon.

1 MR. WAISMAN: Thank you, Your Honor.

2 UNIDENTIFIED SPEAKER: Your Honor, may I be excused
3 till this afternoon too, please?

4 THE COURT: You certainly may.

5 UNIDENTIFIED SPEAKER: Thank you. Thank you, Your
6 Honor.

7 MR. KRASNOW: Good morning, Your Honor. Richard
8 Krasnow, Weil Gotshal, on behalf of the Chapter 11 debtors.
9 Your Honor, the next matter on the calendar is the motion filed
10 at docket number 5952, which seeks authorization and approval
11 of a derivatives incentive plan that is designed to maximize
12 the value of the debtors' derivative assets by aligning the
13 interest of the derivative workforce, which consists of
14 approximately 230 full-time employees devoted to maximizing
15 recoveries with respect to the debtors' derivative business,
16 with the interests of the creditors.

17 Your Honor, in addition to the motion itself, the
18 debtors, on December 8th, 2009, filed a declaration of Mr.
19 Robert Hershan, who is here in court this morning, in support
20 of the motion, as well as a reply in support of the motion,
21 which is at docket number 6214. The Herhsan declaration is
22 docket number 6078.

23 Your Honor, there were three pleadings that were filed
24 with respect to this particular motion. There was the
25 statement in support filed by the creditors' committee; soon

1 after, the motion itself was filed, as well as a statement in
2 support filed by the ad hoc group of Lehman Brothers'
3 creditors. There was as well a response filed by the U.S.
4 Trustee's Office, which I generally would not characterize as
5 an objection to the program. They do raise one issue, which I
6 will address in a moment, but really requesting that we augment
7 the record, which we think we have, but I will address that
8 also in a moment.

9 Your Honor, the motion goes into great detail about
10 the derivatives incentive plan regarding the benchmarks that
11 must be achieved to trigger contributions to the aggregate
12 incentive pool, which pool is capped at fifty million dollars.
13 As the motion also reflects, there are further individual caps
14 and, as well, certain rights of the creditors' committee with
15 respect to aspects of the plan, which are addressed in the
16 motion but I will also point them out, Your Honor, during the
17 course of the hearing.

18 Your Honor, generally the contributions to the
19 incentive pool, under the incentive plan, will be made based
20 upon cash collections, preservations of value of live trades,
21 and counterparty settlement offers, as well as mitigation of
22 claims. A minimum of ten billion dollars, ten billion dollars,
23 Your Honor, of total recovery must be achieved to trigger these
24 contributions to the incentive pool. Your Honor, as explained
25 in paragraph 25 of the motion, for total recovery values

1 between ten and eleven billion dollars, fifty basis points of
2 recovery in excess of the ten billion dollar floor will be
3 contributed to the incentive pool. For recoveries in excess of
4 eleven billion dollars, one hundred basis points will be
5 contributed.

6 There are special thresholds however, Your Honor, in
7 place for special-purpose vehicles, also known as SPVs, and so-
8 called big-bank claims that are mitigated. Moreover, Your
9 Honor, to ensure an objective assessment of contributions to
10 the incentive pool, as I noted, Your Honor, there are --
11 there's a specific role for the creditors' committee with
12 consent rights. Those consent rights apply to an analysis of:
13 the maximum incentive to be paid to each employee; the actual
14 incentive to be paid to each employee; the realizable asset
15 value on the open portfolios where it has been determined that
16 it would be more valuable to preserve the assets rather than
17 sell them, if you will, under current market conditions;
18 settlement offer values; and initial claim values for
19 mitigation. At each of these steps, this is not simply
20 consulting with the creditors' committee but they are in fact
21 imbedded in the process.

22 And I should also add, Your Honor, that the committee
23 was very much involved in the formulation of this plan itself
24 and worked very closely with members of Lehman and Alvarez &
25 Marsal in the development of this plan.

1 Your Honor, with regards to the reply that had been
2 filed by the U.S. Trustee, as I noted, most of the statements
3 which are made there was really a request for an augmentation
4 of the record. They did raise one issue, which we in fact
5 addressed in the motion itself, perhaps in anticipation that
6 this might be something which would be raised by the U.S.
7 Trustee or others, and that's the so-called officer issue, and
8 specifically the application of Section 503(c).

9 Your Honor, the U.S. Trustee, and we in our motion,
10 addressed the question in the first instance as to whether
11 503(c) should be applicable, which we believe would only be the
12 case if this were a retention plan.

13 Your Honor, this is not like the retention plan which
14 was specifically approved by the Court in December of last
15 year. This is a plan, which, as I've described it, Your Honor,
16 and as the motion makes clear, we submit, in excruciating
17 detail, it is a plan which is not -- which does not result in
18 payments because you are there, because you are employed. It
19 is a plan which is premised upon goals being achieved. It is
20 incentive-based.

21 Your Honor, any kind of compensation arrangement,
22 arguably, has retention elements to it. Salaries are, if you
23 will, retention-based; you're seeking to retain individuals by
24 paying them a wage. But as the Courts -- as Dana, a case that
25 the U.S. Trustee cites, makes abundantly clear, merely because

1 a plan, a compensation arrangement, has some elements to it
2 that could be characterized as a retention doesn't make a plan
3 a retention-based plan. This, Your Honor, this plan, we
4 submit, is clearly, on its face, incentive-based.

5 Moreover, Your Honor, we would submit that the
6 "officers", and I'll put that in quotes, Your Honor, who are
7 participating in this program, they are limited in number, one
8 less than we originally had at the time we filed this plan, as
9 the Hershan declaration indicates, are nominal officers in the
10 sense that their only authority as officers is signatory. They
11 do not have any authority as officers with respect to the
12 management of the operations of the business. It is as if they
13 were simply assistant vice presidents and, as I said, Your
14 Honor, they were simply made officers to allow them to be able
15 to sign certain documents. None of the authority which any of
16 these individuals have as members of the derivative team are in
17 any way related to their officer status. If they were not to
18 be officers, signatory officers, they'd still have the
19 authority they otherwise have in the derivative program. And
20 Mr. Hershan has made that abundantly clear in his declaration.

21 Your Honor, I would then turn, if I may, to the record
22 which the U.S. Trustee has asked that we establish. I am
23 prepared to make a proffer, a proffer of Mr. Hershan. I would
24 note, Your Honor, it is a crowded courtroom, and were I to make
25 that proffer, it would simply reflect that which was in the

1 motion, in the declaration and in the reply in which we think
2 we've addressed the issues that have been raised by the U.S.
3 Trustee. I'm more than happy to go through the proffer, but if
4 it's acceptable to the Court, I would say that Mr. Hershan
5 would testify in a manner consistent with all of those
6 pleadings --

7 THE COURT: This --

8 MR. KRASNOW: -- and we could short-circuit it.

9 THE COURT: This is breaking new ground; this is a
10 virtual proffer. Let me find out if this virtual proffer that
11 has been suggested is acceptable to the U.S. Trustee.

12 MR. VELEZ-RIVERA: Your Honor, we've reviewed Mr.
13 Hershan's declaration as well as the reply filed by the
14 debtors. To the extent it's called a virtual proffer, it's
15 acceptable to my office.

16 THE COURT: Fine. I just made that up. I'm not even
17 sure it's a good idea to use that term. From an evidentiary
18 perspective, there's no such thing really; there's either -- if
19 a proffer is designed to expedite a proceeding by dispensing
20 with live testimony, a virtual proffer, it seems to me, is
21 borderline nonexistent.

22 So I will accept the declaration of Mr. Hershan as the
23 functional equivalent of the evidence that he would present if
24 he were called as a live witness. I treat the consent of the
25 U.S. Trustee as acceptance of that declaration and as a waiver

1 of any need to cross-examine him in connection with what he
2 said. I also treat the debtors' reply, which obviously is
3 satisfactory to the U.S. Trustee, not as evidence but as
4 representations of counsel concerning the nature of the
5 program. Furthermore, given the support for the program both
6 by the creditors' committee and the ad hoc committee of
7 creditors, this is a program which obviously is necessary to
8 provide reasonable employment incentives to those employees who
9 have specialized knowledge to extract maximum value out of the
10 Lehman derivatives book. I recognize that Wall Street
11 compensation is generally a hot topic and a topic that people
12 like to take shots at. Nonetheless, in this instance,
13 providing reasonable incentives for these very qualified and
14 absolutely critical employees is an essential ingredient to the
15 success of the Lehman liquidation, at least as it relates to
16 the derivatives book. And so I approve it.

17 MR. KRASNOW: Thank you, Your Honor. There may be
18 some here who are here simply with regards to this motion. May
19 they be excused, Your Honor?

20 THE COURT: Everyone who wishes to be excused in
21 connection with this motion or anything else may leave now.

22 IN UNISON: Thank you.

23 MR. FAIL: Good morning again, Your Honor. Garrett
24 Fail, Weil Gotshal, for the debtors. The next item on the
25 agenda is the debtors' motion for an order approving

1 settlements with Bamburgh Investments (UK) Limited and Corfe
2 Investments (UK) Limited.

3 As set forth in the motion, Your Honor, Alnwick (ph.)
4 Investments (UK) Limited, along with Bamburgh and Corfe, are
5 companies incorporated in England and Wales. They were -- they
6 are wholly indirect subsidiaries of LBHI, and they were formed
7 to carry out certain structured bond transactions.

8 LBHI and its affiliates have agreed in principle to
9 certain transactions that would prevent these companies from
10 being struck off and dissolved, and would substantially reduce
11 the claims against LBHI, maximizing returns to LBHI's
12 creditors.

13 So LBHI seeks authority now to enter into these
14 compromises and settlements, which would allow them to forgive
15 pre-petition amounts owed by Bamburgh and Corfe in exchange for
16 amounts that LBHI currently owes to Alnwick.

17 Only one limited objection was filed, Your Honor; it
18 doesn't object to the relief sought insofar -- at least it's
19 LBHI's understanding that it doesn't object to the settlement,
20 between LBHI and certain of its subsidiaries, of the claims
21 amongst those entities.

22 I believe, Your Honor, that Lehman Brothers
23 International is investigating its books and records in
24 connection with claims it may have against Alnwick, Bamburgh
25 and/or Corfe, or certain other nondebtors. Those claims, if

1 there are any, wouldn't be before Your Honor. To the extent
2 that there is leakage in the transactions such that claims
3 wouldn't be set off dollar for dollar, we've provided for that
4 in the motion and used approximate values.

5 LBHI believes that going forward with these
6 transactions in the orderly liquidation of Alnwick, Bamburgh
7 and Corfe will yield a tremendous value to the estate.

8 I believe someone is here for the liquidators of
9 Lehman Brothers International, Inc.

10 THE COURT: Okay. Do you want to press your limited
11 objection?

12 MS. WARREN: Thank you, Your Honor. Mary Warren of
13 Linklaters, for the joint administrators. When this motion
14 appeared on the docket, LBIE was not aware of it beforehand.
15 LBIE's been investigating its books and records. The books and
16 records that LBIE has access to do show some balances as
17 between these parties A, B and C, as they're called in the
18 motion, and LBIE. We're not sure they're accurate. We've been
19 in -- PricewaterhouseCoopers has been in touch with Alvarez &
20 Marsal, and I understand there have been a number of conference
21 calls trying to work out whether these balances are accurate or
22 not.

23 I understand from an e-mail I received this morning
24 that Alvarez & Marsal is -- has reconstructed the books and
25 records of these entities and is going to share that with

1 Pricewaterhouse but can't do it right now. And I understand
2 there were some other proposals made, such as holding back ten
3 percent of the assets in one of the entities to account for the
4 possibility that LBIE might be a creditor.

5 I know that Mr. Fail hasn't had a chance to verify
6 that with his own client, because this just came up before
7 court today. So what we ask, Your Honor, is that just a
8 reservation of rights on behalf of LBIE pending the parties
9 resolving these issues. And with that stated, we don't object
10 to the settlement.

11 THE COURT: All right. Fine.

12 MS. WARREN: Thank you.

13 THE COURT: There are no objections to this other than
14 the LBIE reservation of rights, which, as clarified, is not an
15 objection to approval of this arrangement. I will acknowledge,
16 based upon my review of these documents, that this appears to
17 be an unusually complex set of arrangements schematically
18 depicted in the pleadings and related to something that sounds
19 like the next Bjorn (ph.) movie, "The Helsinki
20 Recapitalization", which I don't fully understand. It is a
21 good title, and maybe you can extract asset value from that. I
22 don't know what it means. What is the Helsinki
23 Recapitalization?

24 MR. FAIL: Your Honor, there may be --

25 THE COURT: Is that another tough question?

1 MR. FAIL: It is. And I would say it's transactions
2 involving nondebtor subsidiaries that we need not burden the
3 Court with this morning.

4 THE COURT: Fine, we won't go into that at all, then.
5 It's approved.

6 MR. FAIL: Thank you very much, Your Honor. Thank
7 you. With respect to the conversations that -- I do
8 acknowledge on behalf of LBHI that there are conversations
9 ongoing with LBIE, reserve all rights to challenge the nature
10 of the conversation and the context of the conversations that
11 the representative for LBIE has just articulated, however.
12 Another reservation of rights, Your Honor.

13 THE COURT: Okay.

14 MR. FAIL: The next motion --

15 THE COURT: All rights are reserved.

16 MR. FAIL: Thank you. The debtors' motion -- the next
17 item on the agenda is the debtors' motion for an order
18 modifying the automatic stay, to the extent applicable, to
19 allow settlement payments under a directors' and officers'
20 insurance policy.

21 Your Honor, as set forth in the motion, it's the
22 debtors' position that the policy proceeds at issue here are
23 not property of the debtors' estate. Nonetheless, as an
24 alternative argument, the debtors moved to get this comfort
25 order and, to the extent that the proceeds are property of the

1 estate, have demonstrated that cause exists to lift the
2 automatic stay to allow for the payment. In particular, as
3 noted in our reply which was filed yesterday, Your Honor, prior
4 orders of this Court, which are final and nonappealable orders,
5 previously authorized two things that are relevant; the first
6 is the use of these insurance proceeds to pay officers' and
7 directors' defense costs. Another order, Your Honor, entered
8 by this Court approved the use of the -- the establishment of a
9 three million dollar fund to fund officer and director
10 liability defense costs that would not be covered by the
11 insurance proceeds.

12 The debtors have been informed, and it's their
13 business judgment, that payment of the approximately 1.6
14 million dollar settlement at issue here from the policy
15 proceeds would expend less cost, it would be a lower cost than
16 continued litigation of the underlying action, which is the
17 Openwave action, as it's been captioned in these papers.

18 Additionally, Your Honor, the settlement of the
19 Openwave action does eliminate or reduce the potential
20 indemnification claims that Ds and Os may others may otherwise
21 seek to assert against the debtors. So any policy proceeds
22 that would be depleted by use of what would be Side A policy,
23 as has been discussed in these papers, would be
24 greater -- there would be a greater reduction in Side B claims,
25 to the extent that LBHI had to reimburse the debtors (sic) and

1 officers for any payments.

2 Additionally, settlement of the action would avoid
3 collateral estoppel. We also believe that there's no immediate
4 risk that policy proceeds would be depleted. The debtors, as
5 noted in the motion and in the reply, have a total of 250
6 million dollars of coverage. To date, only approximately
7 twenty million of that has been depleted and we're fifteen
8 months into these Chapter 11 cases, Your Honor.

9 The insurers are willing to fund this settlement
10 payment that will resolve the litigation, but there's always
11 the risk that they would be unwilling to provide coverage for
12 certain judgments going forward.

13 In addition, Your Honor, the settlement that was
14 reached is contingent upon court approval of this motion, so we
15 would submit that the Ds and Os are in immediate need of the
16 insurance proceeds.

17 One other point, which we highlighted in the reply to
18 the objections that were filed, Your Honor, is simply to
19 reiterate the point that there is no direct coverage for LBHI
20 in this policy; that was what would be referred to as Side C
21 coverage, which the objectors highlighted for the Court was
22 terminated pre-petition. So the only coverage that's available
23 is direct coverage for directors and officers, or coverage for
24 LBHI to the extent that it is seeking reimbursement of costs
25 paid to the directors and officers. And we would submit that

1 in this case that would be limited to the 3 million dollars, to
2 the extent that money was paid out of the fund, and then that
3 those reimbursements were allowed under the insurance policies;
4 so a de minimis amount in light of the 230 million dollars of
5 insurance proceeds that are available.

6 I'm confident that someone's here for the objectors.
7 Unless Your Honor has any questions, I turn the podium over.
8 Thank you.

9 THE COURT: I'll hear from the objectors. Thank you,
10 Mr. Fail.

11 MR. CLARK: Good morning, Your Honor. David Clark of
12 Epstein Becker & Green, for the InfoSpace and Intersil
13 creditors. I respectfully request that the Court permit my
14 colleague David Tatge from our Washington, DC office to speak
15 on this matter.

16 THE COURT: So does he need to be pro hac'd in to do
17 that?

18 MR. CLARK: We have filed a proc hac vice motion with
19 the Court.

20 THE COURT: I don't know if it's been approved, but
21 he's certainly free to argue.

22 MR. CLARK: Thank you, Your Honor.

23 MR. TATGE: Thank you, Your Honor, very much. Your
24 Honor, David Tatge from Epstein Becker. I'm here on behalf of
25 InfoSpace, Inc., Intersil Investment Company, Intersil Holding

1 GmbH, Intersil Europe Sarl, and Xicor LLC.

2 Your Honor, as we set forth in our papers, and I think
3 as you just heard from the debtor, this policy and all the
4 policies have two types of coverage: the Side A coverage for
5 the D&Os, and there's also Side B coverage for indemnification
6 claims. Where, Your Honor, that duality exists, the policy
7 proceeds, under applicable law, are property of the estate.
8 This is not a situation, Your Honor, where there's just Side A
9 coverage covering the D&Os. And I would cite the Court again
10 to the --

11 THE COURT: So let's just say for the sake of
12 discussion that it is property of the estate, and I recognize
13 that the debtor doesn't concede that. What on earth is wrong
14 with using property of the estate to settle burdensome
15 litigation for what seems to be a fairly reasonable amount, and
16 how on earth are your clients adversely affected by that, and
17 what claims do they have against the coverage?

18 MR. TATGE: Okay. Your Honor --

19 THE COURT: Answer those in order, please.

20 MR. TATGE: Okay. Those are all good questions, and
21 they're the same questions I'd ask, because I think that the
22 Court is exactly right. I think the debtor has pretty much
23 conceded that these policy proceeds are property of the estate;
24 they don't concede it, but I think that is the applicable law.

25 THE COURT: No, they haven't conceded it. I'm just

1 saying for purposes of this question, let's assume it.

2 MR. TATGE: Right. Okay, well, the first thing, Your
3 Honor, I would say is what we need to do to be able to answer
4 your questions is I would like thirty days to take discovery
5 from the debtors, because we asked a bunch of questions that I
6 think are relevant to this issue, and the debtor didn't answer.

7 THE COURT: What kind of claims do your client have?

8 MR. TATGE: Okay, what we have, Your Honor, we have
9 claims against Lehman and against Lehman Brothers -- that's
10 Lehman Brothers Inc. in the SIPA proceeding -- and against
11 Lehman Brothers Holding for auction rate securities that my
12 clients were sold by Lehman Brothers Inc. pre-petition. We've
13 asserted, Your Honor, a claim on behalf of the Intersil
14 Company, as I say Intersil collectively; I believe it's about a
15 hundred million dollars, and I believe it's about almost forty
16 million dollars on behalf of InfoSpace. And we attached to
17 those claims to the legal papers that were filed in connection
18 with this.

19 The bottom line, Your Honor, is that my people feel
20 that they were misled by the debtors, and there's a number of
21 other -- you know, we have about ten claims, Your Honor, in
22 each of those proceedings. These are --

23 THE COURT: I understand. This a situation where --

24 MR. TATGE: Right, right.

25 THE COURT: -- auction rate securities were viewed as

1 being as the functional equivalent of a money market fund in
2 terms of liquidity and have turned out not to be.

3 MR. TATGE: Right, they violated our investment
4 policies --

5 THE COURT: But so what?

6 MR. TATGE: Okay --

7 THE COURT: So you were one of tens of thousands of
8 claimants in this case. What gives you any special right to
9 stand up here now and make a claim about how proceeds of D&O
10 insurance should be used in the best business judgment of the
11 debtor.

12 MR. TATGE: I think, Your Honor, a couple things. One
13 of the questions that we asked, and this goes to what I've said
14 earlier, one of the questions that we asked, and we really
15 would like to take discovery, to be honest, how many other
16 claims are there against these policies, not only for auction
17 rate securities but for anything that might be covered by the
18 policies that the debtors know. Okay? And one of the
19 questions that would -- comes to mind is are these policy
20 proceeds going to be exhausted or not? The debtors are here
21 telling the Court there's 250 million dollars of coverage. We
22 spent 20 million dollars so far, so now we're digging into the
23 excess cover (sic), which is what brought this motion before
24 the Court. But what we don't know, Your Honor -- okay, we know
25 from what I've just told the Court that my clients alone -- we

1 have 140 million dollars of claims. If we would get judgments
2 against Lehman Brothers D&Os or employees who are responsible
3 for the actions that harmed my clients and some of the client's
4 indemnity, that's a claim against Side B under the policy.

5 THE COURT: Can I ask you a question?

6 MR. TATGE: Yes, Your Honor.

7 THE COURT: Do your clients currently have any pending
8 litigation claims in any court against the officers and
9 directors of Lehman Brothers?

10 MR. TATGE: Your Honor, we do not. I will tell you
11 that we have attached to our claims a draft FINRA action naming
12 directors and employees of Lehman Brothers, but we have not
13 made as yet claims against individual D&Os. We intend to do so
14 and we will be doing so.

15 THE COURT: Well, I mean, that's your privilege.
16 Whether or not it's a good claim, I don't know, but what
17 standing do you have now to be getting up and complaining about
18 what on its face appears to be a rational use of insurance
19 proceeds?

20 MR. TATGE: The standing that we have, Your Honor, is
21 that by paying the Side A claims now, the estate's going to be
22 harmed because there's less Side B coverage later, particularly
23 where these policies are going to be -- there may not be enough
24 coverage, and we don't believe -- we think once discovery comes
25 out and we know the size of all the claims that are against

1 these policies and what sort of indemnifications are or might
2 be requested of the debtor, the answer is that the D&Os will
3 have benefited at the expense of the estate because they're
4 going to have gotten paid first and everybody else will have
5 gotten paid -- you know, the money from the estate that my
6 people will get a dividend from as an unsecured creditor of the
7 Lehman Brothers estate and of the SIPA estate is going to be
8 less than it would otherwise be. So we will have been harmed.
9 Whereas, Your Honor, if -- you know, that might not be an issue
10 if we take discovery and we find out, Your Honor, that
11 there's -- that all the total claims are less than 250 million
12 dollars so that in a -- you know, that there's a chance -- you
13 know, there's less of chance that that's going to happen. But
14 we think, Your Honor, that there is a chance that my clients
15 will be harmed in that fashion, and we think, Your Honor, that
16 that's what gives us the right to come here, because we say,
17 and as some of the cases have said, when there is Side A and
18 Side B coverage, particularly here where there is no priority
19 of payments, it was never triggered by Lehman Brothers, we said
20 where's the notice from the CFO. The reply papers of Lehman
21 don't say anything about that. So I infer that that means that
22 the priority of payments was never triggered.

23 So therefore I'd say, Your Honor, that the estate has
24 a much greater interest here. And we also asked, as you see in
25 the papers, the estate had the right to terminate D&O coverage

1 for former directors under Delaware law. Lehman Brothers
2 Holding had that; we cited the case to the Court. And one of
3 the questions that we had is certainly when the debtor has
4 current officers and directors before the sale of substantially
5 all its assets to Barclays, there would be coverage. But this
6 particular action for Openwave was filed several months -- it
7 was filed in November 2008, several months after that sale.

8 So there's a number of things, Your Honor, that we
9 think that what we would like to do is have thirty days, or
10 maybe sixty days, to take discovery, come back before the
11 Court, and then we'll be -- I'll be in a better position to
12 answer your question, and the Court will better be able to
13 weigh should it lift the stay or not.

14 I think, Your Honor, right now there's an incomplete
15 record that for the Court to really be able to balance the
16 risks and the harms -- because none of us know what other
17 claims are out there, what indemnification claims have been
18 made, what are the total damages claimed, what type of claims
19 are out there, none of us know, the debtors didn't say anything
20 about it; it just says, well, it's only 1.6 million out of 250
21 million, so it's okay. There could be a billion dollars' of
22 claims. There could be two billion dollars of claims. We
23 don't know. But we think that the estate is not being
24 protected, Your Honor, and that my clients, as unsecured
25 creditors, are going to be harmed because of that. And I think

1 that's what gives us standing, Your Honor.

2 THE COURT: Okay.

3 Is there anyone else who has any position to assert
4 with respect to this motion?

5 UNIDENTIFIED SPEAKER: I did not file papers, Your
6 Honor, but may I be heard briefly?

7 THE COURT: No.

8 UNIDENTIFIED SPEAKER: All right, thank you.

9 THE COURT: Although I'm always happy to see you in
10 court, this is not a time when I allow for what amounts to open
11 discussion. Parties who have filed objections or who have
12 fiduciary roles to play in the case are welcome to be heard.

13 Does the committee have any position on this?

14 MR. O'DONNELL: Your Honor, Dennis O'Donnell, Milbank,
15 Tweed, Hadley & McCloy, on behalf of the committee. Your
16 Honor, the debtor (sic) supports the debtors' position on this
17 particular motion. We won't delve into the particular
18 arguments raised by the movants here but believe that in fact
19 the -- at this point in time, the debtors have a better
20 argument.

21 We have reserved our rights previously, with respect
22 to the other motions made to lift the stay here, to take a
23 different position down the road to the extent the debtors wind
24 up with indemnification claims that they could recover on. We
25 don't think that time has come yet, and we don't think it's

1 appropriate to make those arguments at this point.

2 THE COURT: Has the committee independently evaluated
3 the fairness of the proposed settlement which would be
4 implemented by virtue of the use of these insurance proceeds?

5 MR. O'DONNELL: Yes, Your Honor, we have and we've
6 presented it to the committee, and the committee believes that
7 the cost benefit analysis here in terms of the potential
8 defense costs to be incurred versus the payments to be made
9 here weigh heavily in favor of doing the settlement as
10 proposed.

11 THE COURT: Okay.

12 Does the debtor have any thing more?

13 MR. FAIL: No, Your Honor. In light of all the
14 pleadings and the oral argument, we would request that the
15 Court approve the debtors' motion.

16 THE COURT: I'm going to approve the debtors' motion
17 and overrule the objections that have been put forth by counsel
18 for Intersil, InfoSpace and Xicor. The objections, as I've
19 heard them articulated and as I've read them, are predicated on
20 a great deal of speculation and relate to not so much claims to
21 protect the debtors' estate as much as it is claims potentially
22 to protect parties who may someday bring claims that may one
23 day be subject to the same insurance coverage. That's a pretty
24 remote objection at this point, particularly when measured
25 against the business judgment in settling litigation, within

1 policy limits, in a manner that will result a potential
2 significant saving of defense cost that would also eat into the
3 policy proceeds.

4 I note that during the course of the Lehman bankruptcy
5 case a number of motions have been presented relating to
6 comfort orders for the Ds and Os. This is the first motion
7 that has produced any objection. I consider the objection to
8 be, at a minimum, premature, particularly since those claimants
9 who are making the objection have no presently cognizable
10 claims as to any of the proceeds of the D&O coverage. But in
11 making this ruling, I'm mindful of the committee's observations
12 that they have reserved their rights, and just because I have
13 approved this motion does not necessarily mean that other
14 similar motions will be approved, provided that good objections
15 are lodged as to the use of those proceeds at some future date.

16 So the objections are overruled without prejudice to
17 the promulgation of other appropriate objections in the future.

18 MR. FAIL: Thank you very much, Your Honor. The next
19 item on the agenda --

20 MR. KRASNOW: Your Honor, Richard Krasnow. Actually,
21 I'm standing just to advise the Court the next motion is the
22 motion of Merrill Lynch for modification of the stay. And
23 therefore I will turn over the agenda for counsel for Merrill
24 Lynch.

25 THE COURT: Good morning.

1 MR. GOFFMAN: Good morning, Your Honor. Jay Goffman
2 of Skadden Arps, on behalf of Merrill Lynch International and
3 certain of its affiliates. With me, my partner, Mr. Zimmerman.

4 Your Honor, after being in front of -- in this court
5 for the last nine months on Charter Communications, it's a
6 pleasure to be here on something else. But, frankly, I'm
7 surprised that we're here today arguing over this motion. I
8 think there's some confusion about what it is we're seeking and
9 what we're not seeking, and I'd like to spend a few minutes
10 describing it, if I may.

11 THE COURT: Sure.

12 MR. GOFFMAN: Prior to the Lehman bankruptcy, Lehman
13 had a longstanding euro medium-term note program. Notes would
14 be issued by LBT, the Lehman Dutch entity, and they were
15 guaranteed by LBHI, U.S. entity. Merrill Lynch has bought some
16 of these notes.

17 When LBHI filed for Chapter 11, as a matter of law the
18 notes against LBHI accelerated. We think that's black-letter
19 law. But under Dutch bankruptcy law, we actually have to send
20 a notice of acceleration. We're permitted to send the notice
21 to LBT, there's no dispute about that, but in order for the
22 notice of acceleration against LBT to be effective, we were
23 also required to send a simultaneous notice to LBHI.

24 The notice we send to LBHI, again, is designed merely
25 to make the notice as to LBT effective. As to LBHI, it's a

1 ministerial act with no substantive impact on the LBHI estate.
2 Again, the notes accelerated as a matter of law upon filing; we
3 think that's clear black-letter law.

4 So it has no impact against LBHI. On the other hand,
5 sending them the notice allows their claims to be accelerated
6 against LBT, which allows the claims to be appropriately valued
7 and calculated in the Dutch proceeding and will allow that
8 Court to move forward with its liquidation process. That's why
9 the LBT trustee filed papers in support of our motion and is
10 here today so support that motion.

11 Now, I point out to the Court that no one else in this
12 case has filed a motion to lift the stay, to do just what we're
13 seeking to do. We know many parties have sent in these notices
14 both to LBHI and LBT providing for the acceleration, and the
15 question is why, why hasn't anyone filed these motions? We
16 know from talking to other parties that all the rest of the
17 parties said it has no substantive impact against LBHI, it's
18 merely a ministerial act. So they took the view that it wasn't
19 a violation of the automatic stay. We said maybe, but it's a
20 close question, and we should come to the Court and we should
21 ask permission rather than coming back later and asking
22 forgiveness. And that's what we're doing here today.

23 Now, for some reason LBHI decided to object to our
24 request. They didn't object to any of the acceleration notices
25 they've previously gotten from any of the parties. They didn't

1 come running to this Court and say violation of the automatic
2 stay, Judge, hold them in contempt, they're harming the estate.
3 They've got lots of these notices, we think, for billions of
4 dollars.

5 We're not quite sure why they decided to object to
6 ours, but we do know a few things. First, we are not seeking
7 to create any claims against LBHI today. We're not seeking to
8 have our claims allowed against LBHI today. They want to go
9 through an objection process, good, they can go through it;
10 they're free to do so. They can raise any defenses they want.
11 All that's happening today is, if the relief is granted, is we
12 send in the notice, the ministerial notice to LBHI, and as a
13 result our notice to the Dutch trustee is effective and that
14 case can proceed and our claims can be properly valued.

15 Frankly, the only way this could have an impact, in
16 our view, on the LBHI estate is to help LBHI. To the extent
17 our claims are properly valued in the Dutch estate and get paid
18 an appropriate amount with all the other claims, it ends up
19 reducing the amount that we have to seek against LBHI as a
20 guarantee. To the extent we're not permitted to move forward
21 and have our claims valued there, it can only increase the
22 amount of our guaranteed claim.

23 Moreover, Judge, even if you were to accept the
24 debtors' position that somehow something we're doing here is
25 impacting the LBHI estate, that somehow, on a basis we don't

1 understand, that it's increasing the claims against the LBHI
2 estate by a dollar, it's not harm. As Your Honor's recognized
3 on many cases, this occasion -- this is a liquidation. All the
4 claims need to come in; at some point they all need to be
5 valued, they all need to be calculated, and then there'll be
6 some sort of pro rata distribution. The mere fact that another
7 claim is valued at a dollar more or a dollar less is not harm
8 to the estate; on the other hand, clearly harm to Merrill Lynch
9 and anyone else that's done this if they're not able to
10 appropriately pursue their claims in the Dutch court and
11 therefore it can't get paid on those claims.

12 I also don't understand the debtors' request that our
13 claim only applies to the notes we have -- we hold today.
14 Doesn't make sense to me, Judge. Are we supposed to every day
15 that we buy another note come back and file another lift-stay
16 motion and ask Your Honor to rule again on the same facts, the
17 same legal issues? Your Honor's going to make a determination
18 as to whether or not the stay applies, and if it does whether
19 it should be lifted. It's the same whether for the claims I
20 hold today or the claims I might buy tomorrow; there's no
21 difference.

22 Finally, Your Honor, I would make it clear to the
23 Court that there's no issue in our providing documentation to
24 the debtor. I saw something in their papers that we had
25 somehow withheld information. I talked to Mr. Krasnow; Mr.

1 Krasnow and I have known each other for twenty-five years. All
2 the relevant information is in the proof of claim. Moreover,
3 to the extent that they wanted any more information, they
4 wanted the documents, I offered to provide it to them under an
5 appropriate confidentiality agreement. He told me the only
6 appropriate confidentiality agreement was one in which he's the
7 final decision-maker as to whether or not to disclose anything.
8 I said that's not an appropriate confidentiality agreement. He
9 said he would serve discovery. I said if you do, we'll respond
10 to it. There hasn't been any.

11 But it doesn't matter, Judge. This is really a very
12 simple situation. If we're allowed to move forward, we serve a
13 ministerial notice to the debtor; it has no impact on the
14 debtor. It could theoretically help the debtor by reducing the
15 amount that we have to seek against them as a guarantee, and
16 our claims can move forward in the Dutch estate and allow that
17 case to move forward.

18 At some point, even in this case, we're going to have
19 to get to -- around to valuing, calculating all the claims.
20 Something that allows that to happen isn't a negative for this
21 debtor; it certainly isn't cause to prevent us from getting the
22 relief as we balance the so-called harms in this case.

23 So I'm happy to answer any questions Your Honor has,
24 but other than that, we would ask that Your Honor enter the
25 relief we requested.

1 THE COURT: I don't have any questions, other than to
2 find out whether it makes better sense in terms of procedure to
3 hear from Mr. Mayer concerning his support for the motion, or
4 whether I should hear from him after I hear the opposition. I
5 think it makes sense to hear from Mr. Mayer now; that way I
6 have everybody lined up on the same side.

7 MR. MAYER: Thank you, Your Honor. For the record,
8 Thomas Moers Mayer of Kramer Levin Naftalis & Frankel, on
9 behalf of, I apologize for the long name, Rutger
10 Schimmelpennick -- I believe the reporter has a spelling -- and
11 Frederic Verhoeven, as co-trustees of Lehman Brothers Treasury
12 Co. B.V.

13 Your Honor, we are in support of the motion, although
14 for somewhat different reasons. Our interests are in the ease
15 of administering our own estate. So I don't have to agree with
16 everything that was just said by Merrill Lynch, and in
17 particular the closing comments on facilitating the allowance
18 of claims. That's kind of the whole point. Nothing that's
19 going on today, in our view, should relate to the allowance of
20 claims at all in this proceeding.

21 But we have a separate proceeding to administer, and
22 we have to interpret our own documents and our own law, and it
23 does facilitate that proceeding if, for purposes entirely
24 solely limited to the allowance of claims in our proceeding,
25 under Dutch law, this ministerial act can be countenanced. I

1 don't have witnesses here today, but I can indicate, as counsel
2 to the trustee, we also have received calls indicating that
3 people have filed notices of acceleration. And in fact just
4 last night somebody called me and said what's going on in
5 court, what's this bit about relief from the stay for notice of
6 acceleration, we sent one in and never occurred to us to do
7 anything else.

8 If this Court determines that the stay does apply and
9 decides that it should not be lifted, my client will be faced
10 with the unenviable task of figuring out whether under Dutch
11 law, in a Dutch proceeding, folks who sent notices that may be
12 deemed to be void under American law nonetheless have effect
13 under Dutch law. And I guess if we have to make that
14 determination we will, but it seems to me not the best process
15 to have the stay in the United States affect proceedings that
16 are happening solely in the Netherlands. And I believe the
17 Court could enter an order which very carefully provides that
18 nothing that happens with respect to this notice shall cause
19 any claim against LBHI or any American debtor to increase,
20 decrease or otherwise be affected, pending further orders of
21 this Court, and that relief is granted solely to allow the
22 allowance-of-claims process to proceed unaffected in the
23 Netherlands. And that is really all that we seek.

24 I want to state for the record, the trustees don't
25 advocate that anyone accelerate or not accelerate; that's not

1 our job. But our job is to figure out what it means when
2 people have accelerated and what happened, and if in fact they
3 have accelerated. And permitting or countenancing these
4 notices to be filed with no effect on the American proceeding
5 will help us in the Netherlands.

6 And I'm happy to answer any questions the Court has.

7 THE COURT: I have a question that's very naive. If
8 there were no permitted acceleration, let's just say for the
9 sake of argument that all of the earlier notices are void as
10 stay violations, and let's just say for the sake of discussion
11 that I agree with the debtors and I don't grant the Merrill
12 Lynch motion, under applicable insolvency law of the
13 Netherlands, is it possible for the Netherlands Court to deem
14 all of the claims relating to the euro medium-term note program
15 to be accelerated, notwithstanding the lack of formal notice,
16 for purposes of claim allowance and case administration?

17 MR. MAYER: I will hazard an answer to that on the
18 understanding that I am not a Dutch lawyer, and there are rules
19 for providing expert testimony on foreign law, which we can
20 meet if necessary. But this is my understanding.

21 THE COURT: No, I'm just asking you a very simple
22 question.

23 MR. MAYER: This is my understanding. I'll do my
24 best, Judge.

25 THE COURT: Okay, qualification noted.

1 MR. MAYER: First of all, as a matter of what does the
2 law of the Netherlands -- positive statutory civil law of the
3 Netherlands provide? There's no automatic acceleration, and
4 without venturing into what a Dutch court might extend to in
5 terms of expanding existing law -- they don't have a common law
6 system over there -- I don't think, as I understand Dutch law,
7 there is something in operative Dutch law that allows a Court
8 to do that. Court might find additional authority, but my
9 understanding from my client is that you're supposed to apply
10 the terms of the documents, which leads to the next answer,
11 which is one I'm not eager to get to. Yes, there is one way
12 that a Dutch Court could deem those notices to -- could deem
13 claims accelerated, and that is to determine that Your Honor's
14 order in this court has no affect and will be deemed
15 disregarded for purposes of allowing claims in the Netherlands.
16 I don't want to go there. I think that would be a necessary --

17 THE COURT: That would be repugnant to me.

18 MR. MAYER: Yes, well, that's why I'm -- that's why
19 I'm urging the Court to allow the ministerial notice to be
20 accepted, because I don't want my client to be in a position --
21 I'm not saying he's there or they would ever get there. But if
22 we were -- we'd have to figure out what it means because some
23 people have filed these notices. And they'll be making
24 arguments that say, well, Judge Peck says they're invalid in
25 New York, but that doesn't mean they're invalid in Amsterdam.

1 THE COURT: Let me ask you --

2 MR. MAYER: I don't want to be in that position.

3 THE COURT: Let me ask you a follow up question
4 which -- and don't draw any negative inference from the fact
5 that I'm asking it -- is this motion being brought on for the
6 benefit of Merrill Lynch or is it being brought on for the
7 benefit of the administrators in the Dutch proceeding?

8 MR. MAYER: No, it's a good question, Your Honor. The
9 answer is we found out about this motion the same time
10 everybody else did. Nobody told us in advance -- at least I
11 don't believe so; Mr. Goffman -- from time to time, we have
12 talked to Merrill Lynch, but this motion came out of the blue
13 for us. It's being brought for Merrill Lynch's benefit. The
14 administrators that I represent, the trustees that I represent
15 believe, in their own interests, it makes sense to see this
16 happen because they have administrative issues, here. But this
17 motion is brought for Merrill Lynch's benefit. We just believe
18 that it helps us in the administration.

19 THE COURT: And one other question, just to give me a
20 sense of the magnitude of the issue. Is there an estimate of
21 the claims, in dollars, represented by notes issued in this
22 program as they might ultimately be allowed against LBT?

23 MR. MAYER: I can give you a rough estimate, Your
24 Honor. I believe it's around 34 billion dollars of claims
25 under the notes, and they're held by, our best estimate is,

1 100,000 individual holders, many of -- I think almost all of
2 them outside the -- well, I can't say almost all of them
3 outside the United States any more, but certainly, originally,
4 they were sold mostly outside the United States, some of them
5 in lots as small as 5,000 euros. So you may have notices of
6 acceleration sent in -- doctors and dentists may be magnifying.
7 We may be talking about, frankly, fairly poor people who bought
8 very low denominated notes, here. And that's part of our
9 problem in allowing these claims in our jurisdiction. But,
10 yeah, these were notes sold in all denominations. There are
11 3700 different notes that were sold under this program --
12 different kinds of notes.

13 THE COURT: Okay, thank you.

14 MR. MAYER: Um-hum.

15 MR. KRASNOW: Your Honor, Richard Krasnow, Weil,
16 Gotshal on behalf of the Chapter 11 debtors. I just note at
17 the outset that we will accept Mr. Goffman's observation that
18 the amount of Merrill Lynch's guarantee claim will be reduced
19 by whatever recoveries they may receive in the LBT case.

20 Your Honor, this is not a ministerial act. Let me
21 take a step back and describe, if I may, certain aspects of
22 these notes which I would advise the Court, whatever the
23 Court's ruling may be, as we understand these notes, they are
24 extraordinarily complex instruments. Whatever methodology may
25 be used to calculate the amount of the claims, these are not

1 claims which are simply, you owe a principal amount of X, the
2 interest rate is Y. Some of these claims may have portions of
3 them which are, I'll call them principal-protected in the sense
4 that one can easily calculate the amount. A good portion of
5 these notes are, I would say, derivative based. Calculations
6 require an analysis of the baskets which were used for purposes
7 of determining what may or may not be due and payable at the
8 end of the day, whenever it is. So whichever way Your Honor
9 rules, the administration of this process, certainly on the
10 part of LBHI, with respect to the guarantee, and based on the
11 extensive discussions we have been having and will continue to
12 have with the Dutch trustees with respect to these notes, they
13 will still be extraordinarily complicated.

14 Your Honor, under the terms of the underlying
15 documents, here, there is not an automatic acceleration with
16 respect to the notes as a consequence of the bankruptcy filing
17 by either the issues as to these notes, LBT, or the guarantor.
18 Nor, as we understand it, under Dutch law, is there an
19 automatic acceleration under their insolvency laws as otherwise
20 exists here. Rather, Your Honor, in order for there to be an
21 acceleration of the notes, if there's an event of default,
22 which event of default was the filing of LBHI which proceeded
23 the filing of LBT, in other words, an ipso facto default, there
24 must, nonetheless, be a vote of a certain percentage of the
25 holders of the notes in order for there to be an acceleration.

1 Not only must those noteholders vote to accelerate, but they
2 must, under the underlying agreements, give notice of the
3 acceleration to both the issuer and the guarantor. It's not to
4 one or the other; it is to both. One might argue that,
5 ordinarily, that is, as has been suggested by counsel, a simple
6 ministerial act. But in determination, we submit, as to
7 whether some action is ministerial or not depends upon the
8 impact of that notice as it relates to LBHI, to LBHI in the
9 estate. In this instance, Your Honor, based upon what the
10 Dutch trustees have promulgated as their proposed methodology
11 for analyzing these claims as it relates to Merrill Lynch, as
12 they've acknowledged in their motion, without an acceleration,
13 their claims might be lower than the claim would be with an
14 acceleration.

15 Merrill Lynch has attached to its motion as, I
16 believe, it's Exhibit C a notice that was -- it is Exhibit C --
17 a report that was issued by the trustees in November of this
18 year. In that report, the trustee has indicated the
19 methodology that -- the trustees, I should say, have indicated
20 the methodologies that they propose to use for the purpose of
21 determining the amounts of various types of claims. Types
22 distinguished not by the nature of the baskets of derivatives
23 that are used to calculate each of the separate 3000 or so
24 issues here, but rather types based upon did the notes mature
25 pre-petition -- that's one methodology -- did they mature

1 during the first year of their case, was there an acceleration
2 during that first year, would the notes otherwise have matured
3 beyond the first year, and what the calculation will be if
4 there's a notice of acceleration. The point of that, Your
5 Honor, is that the trustees have proposed a methodology of
6 crystallizing Merrill Lynch's claims and fixing the amounts,
7 even if there is not an acceleration. Merrill concedes that in
8 their papers. So this is not a situation where, in the absence
9 of being able to give a notice, they may not have a claim.
10 They have a claim no matter what Your Honor does. What they're
11 seeking, here, is to take advantage of one of the methodologies
12 proposed by the trustees, which we understand from discussions
13 we've had with one of the trustees, that the trustees believe
14 that methodologies they've proposed are consistent with Dutch
15 law.

16 They, Merrill Lynch, has said we don't like the
17 methodology that the trustee proposes to use with regards to
18 notes that we hold, and we don't know what those notes are,
19 Your Honor. That's among the information we've asked of them
20 that they won't tell us. And it isn't clear from their proof
21 of claim. I don't know why they won't tell us what notes they
22 hold, I don't know why they insisted that we keep that
23 information confidential, but so be it. We'll accept their
24 representations as to what the impact of all of this would be
25 as to the notes that they hold. They don't like the

1 methodology that would be used in the absence of an
2 acceleration. They want to be able to assert a higher claim
3 against LBT as to which we are indifferent, but also a claim
4 against the guarantor, LBHI.

5 THE COURT: I'm not understanding this. If
6 acceleration means what I think it means, it doesn't change the
7 quantum. It, rather, accelerates the due date.

8 MR. KRASNOW: No, Your Honor. Not under the
9 methodology set forth in the trustee's report. There's a
10 different calculation that would be used. There's a
11 discounting of the claim.

12 THE COURT: What, like, original issue discount? What
13 are we talking about?

14 MR. KRASNOW: Your Honor, I can't -- it's a little
15 more complicated than that, but I would suggest, Your Honor,
16 that for purposes of this hearing, we can't make the comparison
17 as to what the results would be, but Merrill has taken the
18 position -- Merrill has taken the position that the amount of
19 the claim that they would be able to assert, if they're able to
20 accelerate the notes, would be higher both as against LBT and
21 the guarantor, if they can accelerate than it would otherwise
22 be if the trustee uses the nonacceleration methodology set
23 forth in the report and, we understand from the Dutch trustee,
24 which is consistent with Dutch law.

25 THE COURT: Yeah, but what I'm hearing, and I'll give

1 Mr. Mayer a chance to comment in a minute, what I'm hearing
2 said by both counsel for Merrill Lynch and the Dutch trustees
3 is that this is desired by the Dutch trustees because it will
4 avoid a somewhat thorny procedural problem under applicable
5 Dutch law relating to claim allowance. And I'm also hearing
6 that this is at least viewed by Merrill for purposes of what it
7 represents through counsel as a purely procedural matter that
8 is not designed to augment claim dollars, nor is it designed to
9 have an impact on claim dollars.

10 MR. KRASNOW: But Your Honor --

11 THE COURT: That's different from what you're saying.

12 MR. KRASNOW: Absolutely, Your Honor, because it's
13 simply not factually correct. Under the underlying documents
14 which govern these notes, if notice of acceleration is given to
15 both LBT, LBHI, there is an acceleration. There is an early
16 redemption amount calculated in the manner provided in those
17 documents -- very complicated calculations -- which is
18 different from a final maturity amount, which has a different
19 methodology, and as to which, the Dutch trustee has said if the
20 final maturity amount -- as we understand it, from the report,
21 will be calculated in a certain fashion. So the Dutch trustee
22 has a methodology to be used if there's a final maturity amount
23 which is the year beyond the commencement of the Dutch case.

24 That's why I said, Your Honor, this is not a question
25 of do they have a claim, is the claim crystallized. The issue,

1 I think, as been framed by Merrill, is they would prefer to
2 have their claim calculated through an early redemption amount
3 process, which they can only do if they send notices of
4 acceleration to both parties as against a final maturity
5 amount. And if they send those notices, then that limits or
6 may limit our ability to challenge the amount of the guarantee
7 because the agreements say what they say. This is -- I would
8 love for it to be the case, Your Honor, that if Your Honor
9 would lift the stay, there's no question that we can ignore the
10 acceleration notices that would result from that, and we could
11 still challenge the amount of the guarantee claim saying it
12 should be calculated as if the acceleration notice hadn't been
13 given, and therefore, it's a lower amount. But once the stay
14 is lifted, it's lifted, and it has the consequences that will
15 flow from that.

16 If they could simply -- if the Dutch trustee were to
17 tell us, we will accept a notice of acceleration that is simply
18 sent to LBT, and that accelerates the note, and therefore, we
19 will calculate the note as if it had been accelerated in the
20 Dutch proceeding, then we would not be here. The stay doesn't
21 apply; we would have all of the rights that we otherwise would
22 have to challenge the amount of the claim. We wouldn't be
23 bound by what happens. But that's something which Mr. Mayer
24 has suggested, if you will, might be problematical for them as
25 to whether or not they could do that. All right, we'll accept

1 that. Therefore, we're left with a situation where the
2 consequence of the lifting of the stay would be a modification
3 of the amount of the claim they could otherwise -- they being
4 Merrill Lynch -- assert against us to a higher amount. To a
5 higher amount than would otherwise be the case.

6 THE COURT: Okay, well, I'm hearing conflicting
7 presentations as to what's really at issue, here, and I want to
8 hone in on a couple of things.

9 First, Mr. Goffman mentioned during his opening
10 presentation that what makes this Merrill Lynch motion
11 exceptional is that it's one of -- it is perhaps the only
12 motion for relief from stay relating to an acceleration under
13 this program, and that up to this point, the debtor has
14 received some unnumbered number of historical accelerations
15 associated with no programs of this type. Does the debtor take
16 the position that those acceleration notices are of no force
17 and effect because they took place with that stay relief? Or
18 does the debtor take the position that they are what they are,
19 or they are what they purport to be?

20 MR. KRASNOW: Your Honor, there are numerous notices
21 of acceleration that we received prior to the Merrill motion
22 being filed. Until the Dutch trustee filed the report that the
23 filed this past November, and until Merrill, soon thereafter,
24 filed it's motion, bearing in mind there are 3000 separate
25 issues of notes, it was not clear to us that the notices of

1 acceleration could have the adverse impact on our estate -- at
2 least some of the notices, we can't say all of them because it
3 may well be as to some notices of acceleration, the early
4 redemption amounts could be lower than the final maturity
5 amount. But that issue aside for the moment, Your Honor, it
6 was not until the Dutch trustee took the position he did in the
7 report, and, as I said, Merrill filed its motion, that the
8 possibility that the accelerations could give rise to higher
9 claims really came to the fore. And indeed, Your Honor, as a
10 result of the Merrill's motion being filed, subject to how Your
11 Honor addresses this, we have advised, very recently, the Dutch
12 trustees that in connection with the next global protocol
13 meeting which is, in fact, taking place in New York in January,
14 we want to have a more focused discussion about these
15 structured notes in the context of these notices of
16 acceleration that we've had in the past. We've been having
17 discussions with the trustee for months about how you calculate
18 the amounts due under these notes with regards to the
19 derivative aspect of it, and have not necessarily been focusing
20 on, as much, on the early redemption amounts and the final
21 maturity and the affect of the acceleration, other than to
22 observe, one, that there seems not to be the same provisions in
23 Dutch law as in U.S. law with respect to automatic
24 acceleration, and, indeed, we had been requesting of Dutch
25 trustee to know what his legal position was as to how he was

1 going to deal with the nonacceleration of the notes. And
2 frankly, Your Honor, it was not until this report was filed
3 that we were given a more tangible sense as to what his
4 position was.

5 So the fact that we did not take any position or have
6 not taken any position with respect to the notices that have
7 been given is not reflective of what the estate's views are as
8 to the modification of the stay. If it were a pure ministerial
9 act, we might -- we probably would say, for purposes of
10 administration and process, no harm, no foul. What is becoming
11 apparent is there may be a harm, and that's something which,
12 again, with respect to all the other notices, the coordination,
13 if possible, between ourselves and the Dutch trustee is going
14 to be the subject of discussions, come January.

15 But today, we're not dealing with all those other
16 notices, although Your Honor's ruling may have an impact on
17 that. I would also urge that today we should not be dealing
18 with whatever claims Merrill Lynch may or may not purchase in
19 the future. I don't think Your Honor should engage in
20 resolving a nonjudiciable (sic) controversy to facilitate
21 Merrill Lynch's trading. We should be dealing with the issues,
22 concrete issues before the Court which relate to the notes,
23 whatever they may be, that they had purchased. And again, Your
24 Honor, it is based upon Merrill's stated position that if the
25 stay is lifted, they will have a claim in a higher amount. And

1 we're not challenging that proposition. We submit, Your Honor,
2 that under the case law, under Texaco, the cause -- that's not
3 cause to lift the automatic stay.

4 THE COURT: Well, let's just say for the sake of
5 discussion -- and this is really my next question to you -- if
6 we were to craft along the lines suggested by Mr. Mayer, a
7 narrowly tailored, carefully lawyered order that made it
8 absolutely clear that all that was happening here was
9 ministerial, in other words, that narrow will be permitted to
10 issue notices of acceleration with respect to the Dutch
11 insolvency proceeding in the Netherlands, and as required by
12 the documents, will be permitted to issue a similar notice to
13 LBHI as guarantor with the understanding that it has no impact
14 whatsoever on claim allowance. Now, I presume that that's too
15 simplistic, and once lawyers become involved, there'll be some
16 reservation of rights saying provided, however, that the
17 parties reserve the right to assert the position that the
18 claims should be valued either as of the final maturity amount
19 date or the early redemption amount date. I don't know what it
20 would say, but let's just say, for the sake of this colloquy,
21 that good lawyers put their pens to paper and sought to achieve
22 a result that is frequently achieved in this case, which is a
23 negotiated resolution of what is a relatively narrow question.

24 MR. KRASNOW: Your Honor, we've thought about that.
25 And you would almost have to have an order which says, the stay

1 is lifted to allow them to give the notice to both LBT and LBHI
2 for the purpose of acceleration with respect to the LBT
3 proceeding, but that it is deemed that the notice has not been
4 given as it relates to LBHI for the purposes of any claim they
5 may have, here. And it's kind of you have it and you don't
6 have it. So they have the notice and they don't have the
7 notice. Whether something like that would satisfy the LBT, I
8 have no idea because either the notice is given or its not
9 given.

10 The problem is I'm dealing with underlying agreements
11 which we can't modify. As I said, Your Honor, if all that had
12 to be done, here, was a notice to LBT, and it didn't have to be
13 a notice to the guarantor, we wouldn't be in court. I don't
14 think I, as I stand here today, Your Honor, and I have to give
15 it more thought, would have a problem if one had an order
16 crafted that said the notice is effective there, but it's as if
17 no notice was given as against LBHI with respect to the
18 guarantor. That might work for us. But something short of
19 that, Your Honor, is probably very problematic.

20 THE COURT: Well, there may be multiple approaches
21 that will work. I don't know, as I sit here, that that's the
22 only one that will work.

23 Let me ask Mr. Mayer, who was, at various times during
24 the last fifteen minutes or so, trying to get my attention, if
25 he has anything he'd like to add.

1 MR. MAYER: Well, to start at the end, Your Honor, the
2 approach that you outlined, I'm pretty sure we could make work.
3 I need to check with my client as to exact form of wording, but
4 that's almost exactly the kind of thing that we're looking for.

5 We -- I apologize for my rising and falling from my
6 seat, but two things. First, with respect to the effect of
7 acceleration, Mr. Krasnow is right in that it does affect the
8 size of the claim. Our only point is we're trying to make sure
9 it affects the size of the claim only in the LBT estate, and
10 not in the LBHI estate. So there are going to be some notes
11 where early acceleration amount is less than the final
12 redemption amount. There are going to be some where it's more.
13 And the way that works, Your Honor -- and this is an anecdotal
14 example, but it puts a human face on it -- Lehman sold some of
15 these notes in small quantities where the principal amount was,
16 at any one point in time, fixed to the price of bread in
17 Germany. Now, you have people who had remembered the
18 starvation of post-World War II period and wanted to hedge the
19 price of bread in very small amounts. So if you have an early
20 redemption amount, you're going to pick the price of bread at a
21 particular point. It might be higher than the final amount or
22 it might be less.

23 But for purposes of this estate and the approach that
24 you have outlined is the correct one. We urge the Court to
25 enter an order where this doesn't affect this estate at all.

1 And we can wordsmith as to whether the notice is deemed not to
2 have been given or whether it's given, it is deemed not to have
3 any affect. But just for purposes of allowing the claims in
4 the Netherlands, it will help us to simply apply the
5 contractual language, rather than to try to force through a
6 civil law process a legal advance on how we deal, not so much
7 with can we focus on acceleration or nonacceleration, but how
8 do we deal with people who sent the notices already and people
9 who have sent the notices without getting relief from stay or
10 where stay has been denied. I think the approach you outlined
11 is an excellent one, and I think we can make it work.

12 THE COURT: Let me find out, before I hear from Mr.
13 Krasnow, if it's something that Merrill Lynch thinks has
14 potential.

15 MR. GOFFMAN: Thank you, Your Honor. Yes, Your
16 Honor's approach would be acceptable to us. I believe what
17 Your Honor has outlined is exactly what we are trying to
18 achieve. Consistent with what Mr. Mayer presented, sometimes
19 when we accelerate the claims may be higher, and sometimes they
20 may be lower. They're not always going to be higher. But we
21 do want to be on the same footing as everybody else in the
22 world, those parties that are outside the jurisdiction of this
23 Court, those parties that have already sent notices, and they
24 take the position that the automatic stay didn't apply. So we
25 think the narrowly-crafted order that Your Honor just outlined

1 should satisfy all parties. And frankly, that's where we were
2 going when I stood up originally.

3 THE COURT: Okay, I'm seeing discomfort in the face of
4 counsel for the creditors' committee.

5 MR. KRASNOW: Before, may I just make --

6 MR. DUNNE: May not be unusual but --

7 THE COURT: No, I actually watch for discomfort.

8 MR. KRASNOW: You can go first.

9 MR. DUNNE: I just want to be clear that I'm clear on
10 this, and I'll start off by saying, Your Honor, that I think we
11 can all stipulate that this is a very quirky security. I
12 didn't fully understand it the first few times, reading it.
13 What I've analogized it to is it's as if you had a note that
14 said if the obligor files for bankruptcy and I haven't
15 accelerated before it went in, obligor, you owe me a hundred
16 dollars. But if I've accelerated, you owe me 200. So it's not
17 what we typically view as acceleration of a finite principal
18 amount. The acceleration actually adds to the amount that
19 would be due and owing. And I heard Mr. Goffman say,
20 repeatedly, that this is solely to look to the Netherlands
21 estate for that additional quantum of whatever that methodology
22 entails. And we don't represent the creditors over BV, and we
23 understand Mr. Mayer's concern that he'd like some certainty
24 over there. Fine with that, but that's why I think Your Honor
25 was going right down the right path, which is, well, vis-a-vis

1 this courtroom and these estates, can we do something that
2 allows the claim to be asserted in the Netherlands, allow the
3 ministerial act to be given, but vis-a-vis the estate here, Mr.
4 Goffman has said it wouldn't increase the claims. If that's
5 so, then we should be calculating the claim here as if that act
6 hadn't been given and we weren't using the acceleration
7 formula. That was my confusion. Because I think Mr. Goffman
8 wants to say, I already filed a guarantee claim -- in my
9 analogy for the hundred, you know, the pre-acceleration
10 formula. Now, we're just switching methodologies by giving the
11 ministerial act, so I'm going to go back to my pre-existing
12 claim, and lo and behold, it's not 100; it's 200 now. If
13 that's what he thinks we're accomplishing today, then that's
14 more than a ministerial act, and that's not what I hear is the
15 stipulation that would be acceptable to the creditors'
16 committee or the debtor.

17 THE COURT: We spent a lot on this subject, more than
18 I expected. I'm going to give Mr. Krasnow an opportunity to
19 speak. But I think we're --

20 MR. KRASNOW: Yeah, Your Honor, I just wanted to note
21 one thing. I would hazard a guess that, you know, Merrill
22 probably wants its cake and eat it too, which is to say, with
23 respect to the notes it has purchased, and notes it may
24 purchase in the future, it's going to pick and choose which
25 ones it's going to accelerate and which ones it isn't. It's

1 going to make a calculation as to how it's better off, and I
2 think Your Honor ought to factor that in terms of Your Honor's
3 analysis here.

4 THE COURT: Here's what I'm going to do. I'm not
5 ruling today. I'm adjourning this to the next hearing date in
6 January, but I'm also directing the parties, consistent with
7 their other obligations and the upcoming holidays, to exercise
8 their reasonable best efforts in crafting an agreed order to
9 resolve this motion in a manner that would accomplish the
10 following objectives. First, that Merrill, as to the notes it
11 currently holds, would be able to issue a notice of
12 acceleration in the Netherlands in respect of the LBT
13 insolvency proceeding, that it would be able to issue a mirror
14 image notice of acceleration in the United States as to LBHI so
15 as to comply with the requirements of the underlying documents
16 that I have not read and I've only heard about, but I assume
17 that there is such a requirement, as represented; and that
18 there would be -- and this is the hard part -- some
19 appropriate, consensual, without prejudice language that would
20 make clear that to the extent of augmentation of claim dollars
21 otherwise allowable in the Netherlands proceeding, by virtue of
22 acceleration, such augmentation would not have any deleterious
23 impact in the U.S. proceeding and would be either disregarded,
24 or there would be some appropriate reservation of rights with
25 respect to it. Those are my thoughts on it. And actually, if

1 you read the transcript, you might even have the basis for an
2 order.

3 MR. MAYER: I'm sorry, Your Honor. Our next hearing
4 is when?

5 THE COURT: January 13th.

6 MR. KRASNOW: January 13th.

7 THE COURT: So that gives you a little less than a
8 month, particularly if you subtract the days when nobody will
9 be working, with any good luck.

10 MR. KRASNOW: Thank you, Your Honor.

11 MR. GOFFMAN: Thank you, Your Honor.

12 MR. MAYER: Thank you, Your Honor.

13 THE COURT: Malayan Banking.

14 MR. FIRESTONE: Your Honor, Michael Firestone of Weil,
15 Gotshal & Manges for the debtors. As Your Honor noted, it's
16 the Malayan Bank Berhad's motion under Rule 2004, and I will
17 turn the podium over to Maybank's counsel.

18 THE COURT: Okay.

19 MR. CHASE: Thank you, counsel. For the record, Tom
20 Chase of Rottenberg Lipman Rich appearing on behalf of Malayan
21 Banking Berhad, otherwise known as Maybank, a large Malaysian
22 bank. Yeah, we have filed a Rule 2004 motion seeking
23 production of, essentially, plain vanilla account documents,
24 account records reflecting the circumstances under which an
25 interest rate swap was entered in 1999. The basis for our

1 request for this relief concerns the very unique nature and
2 documentation that was entered at that time, memorializing the
3 swap agreement. In 1999, Maybank entered the plain vanilla
4 ISDA master agreement, schedule, credit support annex with
5 Lehman Brothers Special Finance, LBSF, as counterparty. Days
6 later, they entered a confirmation with LBIE memorializing the
7 swap transaction. The interesting part of the LBIE
8 confirmation is that it refers to and incorporates, by
9 reference, all of the terms of the documentation entered
10 between Maybank and LBSF. Everybody who I've spoken to,
11 including Lehman's counsel, Mr. Maurice Horwitz, during my
12 previous request to voluntarily obtain this information
13 expressed surprise and uncertainty as to why this type of
14 transaction would have been entered, whereby LBIE, the European
15 entity and administration, would be the counterparty under the
16 confirmation. But all of the seeming rights and obligations
17 under the ISD documentation, including the CSA which governs
18 the terms under which collateral -- in this case, there was an
19 8 million dollar note posted as collateral -- would be
20 governed. So the CSA documentation provides that LBSF,
21 essentially depending on how you resolve this ambiguity among
22 the counterparties, might be holding this collateral.
23 Certainly, there is no ISDA or other more formal documentation
24 than the confirmation giving LBIE the collateral.

25 So after walking through this information with Mr.

1 Horwitz, back in June -- the swap matured in June, the
2 collateral would be due paid back to Maybank after the ten-year
3 expiration of the term -- he said well, he'd check on it, and
4 he explored some records that seemed to be readily available,
5 and he told me that the collateral was held by LBIE, and we had
6 to go there for further information relating to the
7 transaction, which we did.

8 We hired counsel there to more formally pursue our
9 claims, to investigate, to engage Linklaters in conversation,
10 et cetera. We have been unable to obtain any information
11 relating to this issue from them. We thereby filed the motion
12 that's before Your Honor seeking, what we believe, is really
13 generic information. I was sort of surprised we didn't get it
14 consensually during the initial informal discussions. I was
15 really surprised I didn't get anything in response to the
16 motion, but we didn't. So I don't think that we are requesting
17 anything more that would or should be available via a couple
18 keystrokes on a computer, perhaps opening a file cabinet
19 somewhere. The similar 2004 application which Your Honor
20 denied for which the transcript is attached as an exhibit to
21 Lehman's opposition or objection to our application seemed to
22 involve a much more convoluted series of transactions, or
23 multiple series of transactions whereby the money, among other
24 things, was at Barclays and moved around, and Your Honor denied
25 that application. Reason --

1 THE COURT: I'll very likely do the same with yours.

2 MR. CHASE: Okay, understood. But we feel --

3 THE COURT: That's not a ruling. That's just a
4 prediction.

5 MR. CHASE: Okay, I'll step up my game, Your Honor.
6 We feel that this information, under any sort of weighing up
7 the equities, is so readily available, concerns a sufficiently
8 sui generis unique situation that it's not likely to open the
9 floodgates to all of the other people with similar
10 documentation. It concerns eight and a half million dollars in
11 collateral, has required us to pursue our claims here, pursue
12 our claims in England, file proofs of claims here that are
13 entirely difficult to value because of the ambiguity in this
14 unusual documentation, that we feel the production of this
15 minimal information is, hopefully, warranted.

16 THE COURT: Okay, I understand what you want.

17 MR. FIRESTONE: Your Honor, Michael Firestone of Weil,
18 Gotshal & Manges. Be very brief. Simply to say that after the
19 motion was filed, we spoke with Mr. Chase again, we said
20 nothing had changed, we don't have the collateral. So as we
21 read the motion, that is essentially what this is searching
22 for: the collateral. LBIE has the collateral. Mr. Chase has
23 a market statement which was -- Maybank received from LBIE
24 indicating that it was most likely in a LBIE brokerage account.
25 So, you know, the requests that have been attached to the

1 motion are extremely broad, which I don't think was touched on
2 in Mr. Chase's remarks. They seek all documents relating to
3 the collateral, they seek all documents on any transaction, as
4 well.

5 THE COURT: Can you confirm in a reliable way to Mr.
6 Chase or Maybank what you just said, which is we don't have
7 this collateral, we think it must be at LBIE, spend your time
8 and money in England?

9 MR. FIRESTONE: Well, short of what we've already
10 done, I'm not sure what more we can do. I can -- certainly
11 willing to talk with Mr. Chase, again, about if --

12 THE COURT: I guess what I'm really getting at is
13 this. I mean, as a matter of -- my decision in Hillson (ph.)
14 has been cited here.

15 MR. FIRESTONE: Um-hum.

16 THE COURT: A very unrelated case except that it
17 involves 2004, but it also dealt with the question of whether
18 2004 is properly used in situations where there is no property
19 to investigate because it's long gone.

20 MR. FIRESTONE: Um-hum.

21 THE COURT: In that case, it was a sculpture; in this
22 case, it's a security. I was assured in the Hillson case that
23 the sculpture was long gone --

24 MR. FIRESTONE: Um-hum.

25 THE COURT: -- and I was satisfied by the facts of

1 that case that Rule 2004 didn't apply. I believe you're
2 probably right, because I accept the representations that the
3 underlying collateral here isn't in the United States and isn't
4 subject to your control. But it's not unreasonable for Maybank
5 to want to know where to spend its time and effort. Can you
6 give them some reliable indication that it's a waste of time to
7 pursuing this motion unless you go elsewhere?

8 MR. FIRESTONE: Your Honor, you know, I can certainly
9 speak with my client and I can speak with Mr. Maybank (sic)
10 about what they would consider more reliable than what we've
11 already told them. We're willing to do that. But we've said
12 that it's not there, and I don't know what else would be more
13 reliable, other than, if there's documentation that we have, we
14 can look at it. And obviously, if there is documentation, we'd
15 consider sharing it, but the representations that we've made
16 and that were made earlier in June are the representations that
17 will be made.

18 THE COURT: Okay, I'm denying the motion for
19 examination under 2004 for reasons substantially similar to the
20 ones that were attached to the debtors' papers in opposition
21 from a hearing transcript dealing with the Carret (ph.) motion
22 for 2004 discovery and also based upon my ruling in the Hillson
23 case. Nonetheless, I'm encouraging the parties to work
24 cooperatively to try to provide informal information that will
25 give Maybank some reason to believe that it doesn't have an

1 asset here to pursue and can concentrate its efforts in the UK
2 in the LBIE case.

3 Additionally, for policy reasons, I consider
4 miscellaneous Rule 2004 requests such as this to be incredibly
5 wasteful. And that was really embedded in my Carret comments.
6 To the extent that parties who have reasonable questions can
7 get those questions answered, that should happen in a reliable
8 way. And motion practice relating to this kind of
9 particularized discovery should be kept to a minimum. I'll
10 entertain orders in respect of denial of this motion, but
11 without prejudice to other procedures that may be adopted by
12 Maybank if they're unable to get information from the debtor in
13 a cooperative form.

14 MR. FIRESTONE: Thank you, Your Honor.

15 THE COURT: Okay, let's -- I think we go to the SIPC
16 agenda?

17 MR. FIRESTONE: Yes, Your Honor.

18 MR. KOBAK: Good afternoon, Your Honor. James Kobak,
19 Hughes, Hubbard & Reed on behalf of the SIPC trustee. We had
20 two items on your calendar: number 18 which concerns the
21 allocation motion and number 19 which concerns the CalPERS
22 matter. I think the discussion before Your Honor in the LBHI
23 case took care of number 19, so the only thing that's left is
24 the allocation motion. I'll try to be as brief as possible
25 because I know it's been a long morning for all of us.

1 We were here in November. I think since that time,
2 several things have happened which represent progress on this
3 issue and should allow us to move forward in what I hope will
4 be a somewhat simplified hearing. I may be optimistic in that
5 regard. As you know, this is a very important motion to us
6 because it's the motion that will help to determine how much
7 customer property is available in the estate, and therefore,
8 help us to determine when and in what quantity we can make
9 distributions to customers.

10 Since we were here, before, a number of parties had
11 objected on the original objection date. We've talked to those
12 parties. A couple of them have withdrawn their objections.
13 We're talking to some others. I'm not sure all of them will
14 withdraw their objections, but I think at least some additional
15 parties will. In addition to that, we had been working with
16 the holding company, which, I think, as we reported to Your
17 Honor last time is working in conjunction with their creditors'
18 committee in the Chapter 11. So we've been talking to them.

19 We've also been talking to LBIE. They do not have a
20 date to object, yet. We have been sharing information with
21 them and with their expert, Grant Thornton, in the case of the
22 holding company and the creditors' committee. So for going
23 forward, we would like to use the date of February 25th --
24 which I think is one of the dates we'd reserved for hearings on
25 SIPC matters going forward, next year -- as a date to bring

1 this forward, hopefully, to determine it. And I don't know if,
2 at this point, that will be a question of law or a question of
3 fact or a mixture of both.

4 One thing that's happened in the interim period is we
5 did receive a substantial brief in support of our position that
6 was filed by the Securities Exchange Commission. That brief,
7 basically, says that our reading of the law and how the
8 15(c)(3) and the securities regulations correspond with the
9 SIPC statute is essentially what our position is, and they say
10 that's entitled to chevron deference. Of course, we agree with
11 that proposition. So I think that what the effect of that -- I
12 don't want to speak for the other parties, they still might
13 want to contest that legal position -- but it seems to me, to a
14 large extent, it narrows the issues to specific items of --
15 where we contend property was not properly segregated or the
16 appropriate calculations weren't made under Rule 15(c)(3).

17 So our proposal is to try to go ahead on the 25th. We
18 would ask that the date for objections from those parties who
19 haven't objected be set as January 22nd, which we think gives
20 everyone ample time to consider exploring the facts, and will
21 give us ample time and Your Honor ample time to know what
22 issues really are likely to go forward on the 25th. We would
23 hope that those objections would have a fair degree of
24 specificity so that we would know particularly what items they
25 think they might want to dispute and -- with some degree of

1 specificity, at least in a few sentences, what the nature of
2 their disagreement with our position is. We think that's the
3 most practical way for going forward.

4 THE COURT: It sounds practical to me, as well. I
5 think just for purposes of appropriate notice to parties who
6 may not be here and just in order to discipline the process
7 beyond your remarks from the podium, that it would be a good
8 idea to have these dates set forth in a pre-trial order of some
9 sort.

10 MR. KOBAK: I think -- if Your Honor believes this is
11 a reasonable schedule, I think we'll try to do an order and
12 circulate it among the interested parties and file it.

13 THE COURT: It sounds like a reasonable schedule to
14 me. I don't know if the objection deadline is early, relative
15 to a hearing date in late February, and I leave that to the
16 parties to adjust. But I think that it's reasonable that there
17 be some outside date by which those parties who are continuing
18 to press their objections have to commit to writing what it is
19 that they're complaining about. And also, it should provide
20 sufficient time, to the extent any discovery is required, that
21 discovery can take place on a consensual basis.

22 MR. KOBAK: Yes. That's our objective, Your Honor.
23 Thank you.

24 THE COURT: Okay. There's someone standing.

25 MR. SCHULMAN: Your Honor, Dan Schulman of Salans,

1 counsel for Svenska Handelsbanken which has noticed a
2 substantial objection.

3 THE COURT: You're too far away --

4 MR. SCHULMAN: Sorry.

5 THE COURT: -- to be heard and appropriately
6 recognized.

7 MR. SCHULMAN: Your Honor, one very small point. Dan
8 Schulman of Salans, counsel for Svenska Handelsbanken which has
9 filed a substantial objection. I note that there have been
10 some responses filed in the SEC's amicus brief. We would ask
11 that objectants (sic) be permitted to respond to the SEC's
12 brief if they so wish.

13 THE COURT: I don't know how you object to somebody's
14 brief if --

15 MR. SCHULMAN: Well, if we -- they filed, basically, a
16 legal brief. We'd like to file a reply brief to that.

17 THE COURT: I think that you should simply participate
18 in the discussions that we've just outlined with counsel for
19 the trustee about a consensual form of order. There's no need
20 for special treatment for your client on this. Everybody will
21 get the same treatment.

22 MR. SCHULMAN: We already have filed an objection,
23 Your Honor.

24 THE COURT: Then there's nothing more you need to do.

25 MR. SCHULMAN: All right, thank you, Your Honor.

1 THE COURT: Okay, we're adjourned until 2:30. Thank
2 you.

3 (Recess from 12:23 p.m. until 2:40 p.m.)

4 THE COURT: Be seated. Good afternoon.

5 MR. CHRISTENSEN: Good afternoon, Your Honor. Evert
6 Christensen from Weil, Gotshal & Manges. First matter on the
7 agenda this afternoon, Your Honor, is a pre-trial conference in
8 the PT Bank Negara adversary proceeding which should be
9 relatively short. Plaintiff's counsel is making his way
10 forward.

11 Your Honor, just to update you, both defendants, LBI
12 and LBSF have filed answers to the complaint, and I believe
13 that the plaintiffs intend to seek permission to amend the
14 pleadings at this point. So with that, I'll turn it over to
15 Mr. Stremba to address the Court.

16 THE COURT: Okay, let me hear about the reason for the
17 amendments.

18 MR. STREMB: Good afternoon, Your Honor. Lee Stremba
19 of Troutman Sanders LLP, counsel to plaintiff PT Bank Negara
20 Indonesia. I have with me, today, my partner, Hollis Cohen.

21 Your Honor, this action arises from a very standard
22 foreign exchange transaction of a type that my client and
23 Lehman Brothers Special Financing conducted hundreds of times
24 before these bankruptcies occurred. My client was to provide,
25 in this transaction, one million dollars of British pounds, and

1 simultaneously, was to receive the equivalent in U.S. dollars
2 from LBSF at the rate agreed upon, which was 1.765 dollars per
3 pound. The agreement was entered into on September 12, 2008,
4 shortly before the bankruptcies. It was to be concluded on
5 September 16. On the 15th, my client made the arrangements to
6 deliver the British pounds to the agent for LBSF. In this
7 transaction, as in hundreds before it, LBSF designated Lehman
8 Brothers, Inc. as the receiving agent for my client's British
9 pounds. And so that is why LBI is a party to the lawsuit. The
10 British pounds were delivered to an account of LBI at Citibank
11 London. The bankruptcy of Lehman's -- LBI's parent occurred
12 roughly at the same time, and when our client found out about
13 that bankruptcy, demanded the return of its British pounds.
14 Ultimately, several days later, Lehman Brothers Special
15 Financing went into bankruptcy. As of that time, my client's
16 funds remained at Lehman Brothers, Inc. It never was
17 transferred out of that account. So what we have is a claim
18 against LBI --

19 THE COURT: Let me just check on something you said.

20 MR. STREMB: Yes.

21 THE COURT: You said the pounds remained at Lehman
22 Brothers, Inc.

23 MR. STREMB: Yes.

24 THE COURT: I thought that they were deposited to an
25 LBSF account at Citibank.

1 MR. STREMBBA: No, Your Honor, it was an LBI account at
2 Citibank. LBI was the receiving agent. In all of these
3 British pound transactions, LBI received the money on behalf of
4 LBSF. So it was an LBI account at Citibank in London into
5 which --

6 THE COURT: As agent for LBSF?

7 MR. STREMBBA: As agent, yes.

8 THE COURT: Okay.

9 MR. STREMBBA: They call it a receiving agent in the
10 documentation.

11 So the funds were at LBI when the LBI bankruptcy
12 occurred, and when the -- or, the SIPC filing, and when the
13 LBSF bankruptcy filing occurred, they were still in the LBI
14 account at Citibank. Our client had demanded the return of
15 those funds, both from LBSF, it's counterparty, and from LBI,
16 the agent, but they were not returned.

17 We commenced this action, in part, to assert that
18 those funds delivered by my client never became property of
19 either the LBI estate or the LBSF estate. And that,
20 essentially, is the first count of our complaint for a
21 declaration that the funds that were delivered did not become
22 property of the estates. And we also assert that under the
23 theories of constructive trust and unjust enrichment, those
24 funds rightfully need to be returned.

25 Interestingly, Your Honor, a little bit of a quirk in

1 this case, or at least an interesting aspect, under the Uniform
2 Commercial Code, foreign exchange transactions involve the
3 purchase and sale of goods. The funds that are transferred by
4 each party are considered goods, rather than payments for --
5 mediums of payment. And therefore, when my client delivered a
6 million British pounds, it was delivering goods or a commodity,
7 and, therefore, had rights of reclamation and rights pursuant
8 to Section 503(b)(9) of the Bankruptcy Code. And we have
9 asserted those rights -- they were asserted first by way of
10 demand, but they have been asserted as additional claims in the
11 complaint. Now, that's by way of background to explain why we
12 have an issue to deal with by way of amendment.

13 In the answer of LBI, there is an affirmative defense
14 that the action must be dismissed because of a missing
15 necessary party. And based upon those pleadings, the answers,
16 and discussions with counsel for LBI, we understand that my
17 client's funds have been frozen in the LBI account in London
18 since the beginning of the SIPC proceeding because Citibank has
19 asserted setoff rights against all of the LBI accounts. And
20 you probably know a lot more about that than I do, but that's
21 our understanding. As a result, I guess the good news is that
22 my client's funds remain where they were, and we know where
23 they are. The bad news is that because Citibank is asserting
24 rights to those accounts, it does appear to us that we cannot
25 fully adjudicate my client's rights to those funds without

1 having Citibank present in the lawsuit. And for that reason --
2 and we've discussed this with counsel to the other
3 defendants -- what we propose to do is very quickly amend the
4 complaint to add Citibank as a party serve that so that we have
5 all three parties in the lawsuit, and then come back to Your
6 Honor with a schedule for discovery after Citibank has been
7 introduced to the action.

8 Given the requirement, first to amend, then to have
9 time for Citibank to answer, plus a little holiday slippage, I
10 think I would propose that we come back to Your Honor in
11 approximately sixty days, at which point I would hope that all
12 the parties would then be before Your Honor and we could move
13 the action forward.

14 THE COURT: Sounds reasonable to me. Is there any
15 comment from either LBI or LBSF?

16 MR. CHRISTENSEN: No, Your Honor. Obviously, we've
17 answered and we rest on our answer with respect to Mr.
18 Stremba's analysis of the legal claims. But we have no
19 objection to their amending their answer to add Citibank at
20 this point -- or, amending their complaint, rather, to add
21 Citibank.

22 THE COURT: Okay. Sounds fine. LBI?

23 MS. CAVE: Your Honor, Sarah Cave from Hughes Hubbard
24 on behalf of the trustee, and we have no objection to the
25 answer, either -- or, to amending the complaint, either.

1 THE COURT: Okay, does this mean that the complaint
2 can be amended by stipulation without the need for motion
3 practice?

4 MR. STREMB: Yes, Your Honor.

5 THE COURT: Fine.

6 MR. STREMB: Your Honor's permission is required, but
7 I believe --

8 THE COURT: I hereby --

9 MR. STREMB: -- everybody's consenting --

10 THE COURT: I hereby grant you permission.

11 MR. STREMB: Thank you, Your Honor.

12 THE COURT: Okay.

13 MR. CHRISTENSEN: I believe the next matter on the
14 agenda, Your Honor, are the Rule 60(b) motions. With the
15 completion of the pre-trial, that concludes my business before
16 the Court, and I ask to be excused.

17 THE COURT: So you may be excused.

18 MR. CHRISTENSEN: Thank you, and I'll turn it over to
19 those who are here for the 60(b) motions.

20 THE COURT: All right, I'm going to provide a bench
21 ruling with respect to the motion that was argued last week in
22 which Barclays Capital asserted that the filing of 60(b)
23 motions by each of the creditors' committee and the trustee and
24 the LBI SIPC case constituted an at issue waiver of the
25 attorney-client privilege. Here's my ruling.

1 At the outset, the Court examines the relevant law
2 governing the attorney-client privilege. This privilege exists
3 to encourage full and frank communication between attorneys and
4 their clients, and thereby promote broader public interest in
5 the observance of law and the administration of justice. See
6 *Morande Auto Group v. Metropolitan Inc.*, 2009 WL 650444 at *2
7 (D. Conn., Mar. 12, 2009). Accordingly, courts in the Second
8 Circuit have exercised great caution when construing rules
9 resulting in the waiver of the privilege. Per re: the County
10 of Erie, 546 F.3d 222 at 228 (2nd Cir. 2008). An excerpt from
11 that case, "Rules which result in the waiver of this privilege
12 and thus possess the potential to weaken attorney-client trust
13 should be formulated with caution."

14 Generally, courts have found that parties implicitly
15 waive the attorney-client privilege in three factual scenarios.
16 When a client testifies concerning portions of the attorney-
17 client communication, when a client places the attorney-client
18 relationship directly at issue, and when a client asserts
19 reliance on an attorney's advice as an element of a claim or
20 defense. County of Erie, 546 F.3d at 228. It is this third
21 instance of at issue privilege waiver on which Barclays relies.
22 County of Erie sets forth the applicable legal standard in the
23 Second Circuit for determining implied at issue waiver of
24 attorney-client privilege. That case defined the test as
25 whether the moving party can prove that the opposing party

1 "relied on the privileged communication as a claim or defense,
2 was an element of a claim or defense." 546 F.3d at 228.
3 County of Erie examined whether e-mails exchanged between a
4 county attorney's office and sheriff's office concerning strip
5 searches were admissible in a lawsuit challenging their
6 constitutionality. The defendants in that case invoked an
7 objective, qualified immunity defense in that they believed
8 their conduct had been legal. County of Erie, 546 F.3d at 229.
9 The Second Circuit held that the defendant's reliance on an
10 objective, rather than subjective legal defense did not
11 constitute at issue waiver. As stated in that case,
12 "Petitioners do not claim a good faith or state of mind
13 defense. They maintain only that their actions were lawful or
14 that any rights violated were not clearly established. In view
15 of the litigation circumstances, any legal advice rendered is
16 irrelevant to any defense so far raised."

17 Moreover, the Second Circuit emphasized that a finding
18 of waiver requires actual reliance on privileged advice,
19 whereas the "mere indication" of privileged advice is
20 "insufficient to place legal advice at issue." Under the test
21 as enunciated in Erie, then, the 60(b) motions filed by the
22 trustee and the committee did not implicitly waive the
23 attorney-client privilege with respect to their advisor's
24 knowledge and understanding of the sale transaction. Despite
25 Barclays' arguments to the contrary, the claims asserted by the

1 trustee and the committee in the 60(b) motions do not rely on
2 any legal advice provided by their respective advisors, with
3 regard to the sale transaction. Instead, these claims rely on
4 allegedly misleading and incomplete public representations made
5 to the Court at the sale hearing and on the alleged failure of
6 Barclays and certain Lehman executives to say anything to
7 contradict those representations. In other words, the claims
8 asserted by the trustee and the committee in the 60(b) motions
9 constitute what I'll call objective claims, asking the Court to
10 compare in-court disclosures concerning the sale transaction
11 with the provisions of the sale transaction as actually
12 consummated. Neither the trustee nor the committee asserts
13 claims based on their subjective state of mind at the time of
14 the sale hearing.

15 The Court is also not persuaded by Barclays insistence
16 that the context of the claims of the trustee and the committee
17 and the 60(b) motions means that they necessarily waive the
18 attorney-client privilege. At bottom, Barclays seems to argue
19 that reliance that purported mistakes and newly discovered
20 evidence means that the claims for relief under Rule 60(b)
21 necessarily implicate the contemporaneous advice provided by
22 professionals for the trustee and the committee at the time of
23 the sale hearing. Based on the Court's review of these
24 motions, the Court disagrees. The committee argued at the
25 hearing and in its 60(b) motion that the newly discovered

1 evidence underlying its 60(b) motion consists of discovery
2 unearthed during the Rule 2004 investigation, purportedly
3 demonstrating misrepresentations and nondisclosures related to
4 the sale transaction. The trustee's 60(b) motion makes clear
5 that his arguments, with respect to mistakes, are, in fact,
6 premised on insufficient disclosure to the Court. Thus the
7 60(b) motions simply do not implicate and rely on the advice
8 given by attorneys.

9 This holding on at issue waiver comports with widely-
10 recognized principles of public policy. The attorney-client
11 privilege is critically important to ensuring open and frank
12 communications between attorneys and their clients. For this
13 reason, policy considerations weigh in favor of strictly
14 construing any implied waivers of the privilege such as urged
15 by Barclays.

16 Barclays is not unfairly prejudiced by this holding
17 because other means exist for it to obtain relevant information
18 in support of its defense to the 60(b) motions. The agreement
19 by LBHI to share otherwise privileged information is certainly
20 one important source.

21 Additionally, Barclays remains free to pursue
22 discovery from third parties that provided information to the
23 committee and the trustee's advisors concerning the sale
24 transaction. Accordingly, Barclays is not worse off in that it
25 has not been denied access to information vital to its claims.

1 See County of Erie 546 F.3d at 229.

2 Moreover, should it become apparent at a later date
3 that the claims of the trustee or the committee as actually
4 presented, do, in fact, rely on legal advice provided by their
5 respective professionals, then Barclays remains free to assert
6 an at issue waiver at that time and seek additional related
7 discovery.

8 Finally, the fact that LBHI has agreed to produce
9 otherwise privileged documents to Barclays is not relevant to
10 any purported privilege waiver by either the trustee or the
11 committee. The trustee and the committee are not similarly
12 situated to LBHI with respect to the current dispute.

13 As mentioned by counsel for LBHI on the record at the
14 hearing, LBHI viewed itself as distinct from the trustee and
15 the committee because LBHI made representations to the Court
16 with respect to the sale transaction at the sale hearing and
17 LBHI initiated the Rule 2004 discovery from Barclays. LBHI
18 also based its 60(b) motion in part on the contention that its
19 attorneys were kept in the dark with respect to changes in the
20 sale transaction.

21 The motion by Barclays is denied without prejudice to
22 bringing a later motion should it become clear at some future
23 date that the committee or trustee is relying on privileged
24 communications to support 60(b) relief. That's the ruling of
25 the Court.

1 The next item is a motion by the committee. If people
2 wish to leave at this point or change their seat that's fine.

3 MR. TECCE: Good afternoon, Your Honor. James Tecce
4 of Quinn Emanuel on behalf of the creditors' committee. First,
5 let me state at the outset, Your Honor, I appreciate sincerely
6 your entertaining the motion at this hearing. I know that it
7 was not originally scheduled for this time. I understand the
8 Court is extremely busy and I am going to be brief in my
9 presentation this afternoon.

10 THE COURT: Before we get started, what happened here
11 just in terms of the schedule because I had been advised that
12 this was off calendar --

13 MR. TECCE: Correct.

14 THE COURT: -- and then I was advised this morning it
15 was back on?

16 MR. TECCE: Your Honor, we had two motions on calendar
17 for today on the 10 o'clock agenda; this motion and a Rule 2004
18 motion. We adjourned the Rule 2004 motion but we inadvertently
19 adjourned this one as well. We had no intention of doing that,
20 it was fully briefed and the parties were ready to go forward,
21 it was just a mistake.

22 THE COURT: Okay, well, happily I reviewed this before
23 it was adjourned so I'm as ready for it as I'm going to be.

24 MR. TECCE: Thank you very much, Your Honor.

25 Your Honor, the committee motion asks the Court to

1 issue two letters of request for international judicial
2 assistance pursuant to the Hague Convention. The committee
3 submits that the motion does not seek extraordinary relief.
4 Indeed, the committee styles the motion as a procedural motion
5 because of the discreet nature of the relief it is requesting.

6 I note also that the motion is joined by LBHI with
7 respect to the Financial Services Authority or the FSA request
8 and the PricewaterhouseCoopers U.K. request. And LBI joins the
9 motion with respect to the FSA.

10 If the Court grants the committees' motion, it will
11 transmit two letters of request to the High Court in the United
12 Kingdom which will then issue document requests to the two
13 proposed respondents, the FSA and PwC. Both respondents will
14 be given every opportunity to defend against the subpoena in
15 the English courts. Today, we are simply asking the Court to
16 take the necessary first step in that process that enables us
17 to pursue relief from the United Kingdom.

18 With respect to the two respondents, the FSA and PwC,
19 the committee notes that the committee transmitted copies of
20 the motion papers on November 25th to both of those
21 respondents. The committee has since met and conferred with
22 the FSA through a telephone call dated December 3, 2009 and
23 indeed we attach our correspondence with the FSA in connection
24 with our reply papers.

25 The committee also has received indications from

1 senior justice -- from Senior Master Whitaker from the Queen's
2 Bench Division that he will leave a calendar date for Monday,
3 December 21 should the Court grant the motion today. That day
4 will be available for the committee to present their letters of
5 request at this hearing. The Court -- it's anticipated that
6 the Court will schedule a fixture, which I understand is an
7 English term for a future date, for argument and final
8 disposition of the application, again, should the Court grant
9 the motion today.

10 We submit that ample justification exists to grant the
11 motion when the documents that we're requesting are not only
12 relevant but are important to the Rule 60(b) litigation. The
13 movants allege in that litigation that Barclays realized
14 billions in profits from the sale transaction that were not
15 disclosed to the Court. To that end, the narrow document
16 request to seek disclosure that go to approval of the sale
17 transaction by Barclays' regulators. The regulators evaluation
18 of Barclays' results announcement in 2009 and Barclays'
19 independent auditor's evaluations of the assets acquired in the
20 sale transaction and the results announced in the results
21 announcement. Certainly, these documents are relevant and they
22 have probative work.

23 What's more, there is no alternative means to secure
24 the discovery while Barclays has indicated that it may agree to
25 produce its correspondence with the FSA and while that offer is

1 appreciated and would help, it would not result in the
2 production of FSA's internal documents including its
3 contemporaneous notes from meetings with Barclays' executives.

4 Barclays has also indicated that it would consider
5 providing documents, it's -- strike that.

6 Barclays has also indicated that it will provide
7 documents it supplied to PricewaterhouseCoopers. But, again,
8 that would not result in the production of internal work papers
9 from its independent auditor. And while Barclays has indicated
10 that it will consider instructing PwC to do so, we have no
11 assurance that PwC will, in fact, produce those work papers.

12 Barclays is the only objector to this motion, Your
13 Honor. They are not a respondent with respect to the subpoena.
14 The thrust of their objection is that the factual predicate
15 upon which the motion rests is inaccurate and Barclays
16 challenges relevance on that basis. But we will not dispute
17 today Barclays' assertions and we note the Court's analysis
18 should focus on whether the documents are relevant to the Rule
19 60(b) motions instead of deciding whether the Rule 60(b)
20 movants have conclusively proven their claim.

21 The committee submits that it has satisfied the
22 relatively low legal hurdle of demonstrating the documents are
23 relative. The committee alleges a flat transaction was
24 approved but one resulting in billions in profits was
25 consummated, and to that end documents concerning the approval

1 of that transaction by Barclays United Kingdom regulator and
2 its independent auditors is highly relevant.

3 Lastly, Your Honor, Barclays maintains that issuing
4 the letters of request would undermine interest in the United
5 Kingdom.

6 First, we're not asking the Court to direct the
7 production of these documents in violation of U.K. law.
8 Instead, we are simply asking the Court to take the first step
9 in letting us pursue the production of the documents in the
10 United Kingdom. The FSA, PwC and even Barclays can contest the
11 discovery before the English court. But we cannot initiate
12 that process in the first instance without issuance of the
13 letters of request.

14 Secondly, Your Honor, we are not seeking pretrial
15 documents as that term was understood in the United Kingdom.
16 If this were a Rule 2004 application or a similar, quote,
17 unquote, "fishing expedition" Barclays might have a point. The
18 movants are not seeking to depart on a train of inquiry that
19 might produce trial evidence. Instead, they are seeking
20 disclosure in connecting with -- in connection with an existing
21 litigation that is scheduled for argument and possibly trial.

22 Third, to the extent that there are confidentiality
23 issues and concerns, they can be handled by the United Kingdom
24 court.

25 Today's motion and the enter of this order is not a

1 finding on confidentiality issues. It can be addressed another
2 day in the United Kingdom. Because the documents are located
3 beyond the Court's subpoena power, however, there is a
4 precondition to starting that process that the Court issue the
5 letters of request, of course, subject to everyone's rights to
6 debate confidentiality and other issues in the appropriate
7 forum in the United Kingdom. Unless Your Honor has any
8 questions, that concludes my presentation on the motion.

9 THE COURT: I have no questions.

10 MR. TECCE: Thank you very much.

11 MR. THOMAS: Your Honor, Todd Thomas from Boies,
12 Schiller & Flexner on behalf of Barclays and I'm here with
13 Jonathan Schiller who I believe Your Honor knows.

14 We oppose this motion simply because we don't believe
15 the legal standard has been met. Movant has emphasized the
16 relatively low Rule 401 standard of evidence, but, in fact,
17 under the comity analysis that this Court must do the factor
18 that must be considered is the, quote, "importance" of that
19 information, not just its relevance. Here, we don't believe
20 the information is relevant and certainly don't believe it is
21 important. With respect to the PwC papers, we have offered --
22 Barclays has offered to provide and will provide two movants
23 the information that Barclays provided to PwC in order to allow
24 PwC to do their audit.

25 Barclays has also offered and produced two movants

1 information that Barclays prepared for its valuation of the
2 assets. If movant would like to challenge those valuations,
3 they are able to do so without seeing PwC's internal audit
4 papers. They understand what the assets are and they have the
5 ability to go and do their own valuation of those assets if
6 they want.

7 With respect to the FSA internal work papers, again,
8 Barclays has agreed to look for any official correspondence it
9 had with the FSA and to produce those documents. So what we're
10 talking about is just the internal regulatory papers of the
11 FSA. We don't believe those are relevant to this proceeding.
12 Some of those, in fact, don't even relate to this deal but
13 relate to the prior pre-bankruptcy deal which did not occur.

14 Additionally, we attach to a supplemental filing a
15 letter from the English FSA which they asked us to present to
16 the Court and we agree with FSA's conclusion as noted in our
17 brief that this request is also procedurally in conflict with
18 English law which is another consideration for the Court under
19 its comity analysis.

20 We believe that the requests are not to the degree of
21 specificity required under the law. That's a point that the
22 FSA made in their letter. And I would note that the standard
23 in one of the cases cited by movants in the reply brief in
24 terms of how specific the requests must be, it's the
25 Westinghouse case which is 3 W.L.R. 430 at 24 and 25 reads,

1 "The description should be sufficiently specific to enable the
2 person to put his hand on the document or the file without
3 himself having to make a random search. In short, specifically
4 to know what to look for." And, Your Honor, we believe -- we
5 agree with the FSA these requests are much broader than that.
6 And, in particular, the FS -- the request with respect to PwC
7 are even broader than the FSA request.

8 Additionally, we also agree with the FSA's point that
9 this is improper procedurally under English law because it is
10 seeking confidential information.

11 THE COURT: Let me ask you something that occurs to me
12 as I'm hearing your argument. PwC and FSA are not here making
13 these arguments; Barclays is. Are you doing this with the
14 direction and authority of PwC -- PwC and FSA or are you just
15 doing this on your own? Because the appearance is that you're
16 trying to stonewall discovery.

17 MR. THOMAS: Your Honor, we are simply here objecting
18 to it because we don't think the legal standard has been met.

19 THE COURT: Yes, but let me -- just answer the
20 question which is a simple one. Did PwC and/or FSA ask
21 Barclays to carry its argument here so that they didn't have to
22 appear in court and do it, or are you simply doing it on behalf
23 of your client?

24 MR. THOMAS: Your Honor, the FSA asked us to present
25 the letter to the Court. I do not believe any of the

1 communications could be construed as formally authorizing us to
2 appear on their behalf. So we are preparing just on Barclays
3 behalf but we did -- we were asked by the FSA to present this
4 letter to the Court.

5 THE COURT: Okay. And this is a question that I guess
6 I'll raise both with you and committee counsel and counsel for
7 others who are joining in the committees' motion, which is
8 whether any of these issues that you have raised can be raised
9 on December 21st in front of the High Court at a time when
10 English law can be interpreted by an English judge as opposed
11 to my purporting to interpret English law across the Atlantic.
12 I assume that the answer to that is yes.

13 MR. THOMAS: Yes, Your Honor. If I might add, it is
14 also part of the analysis that the U.S. court, we believe, is
15 intended to engage in before even sending it across the seas
16 because of the comity factors.

17 THE COURT: Well, in what respect is comity implicated
18 in your objection? It seems to me that courts in the United
19 Kingdom and courts in the United States have a shared interest
20 in getting at the truth. And since the 60(b) motions being
21 prosecuted here by LBHI, LBI and the committee all raise fairly
22 significant questions about the truth being withheld. It
23 strikes me as a curious posture for you to be in to be
24 preemptively saying we don't want you to know the truth; we
25 only want you to know what we want to tell you from our

1 records.

2 MR. THOMAS: Your Honor, we certainly don't want to be
3 in that posture.

4 THE COURT: I'm sure you don't.

5 MR. THOMAS: No. And we have provided extensive
6 discovery including all our work papers and we certainly
7 welcome alternative valuations of those assets and we are
8 simply pointing out the courts have emphasized that U.S. courts
9 need to carefully scrutinize applications of this type. But
10 beyond our just pointing out that we don't believe the legal
11 standards have been met here and that we provided most of the
12 information.

13 THE COURT: Could you explain to me why the legal
14 standard is not met?

15 MR. THOMAS: We believe because movants have not
16 demonstrated that the internal work papers of FSA, the
17 regulatory body, with respect to a pre-bankruptcy deal, Your
18 Honor, for example, that was not consummated would be important
19 to this litigation.

20 THE COURT: Let me tell you why I think it might be.
21 One of the things about this transaction that's highly unusual
22 and I think everybody who has observed this case recognizes it,
23 is that the transaction happened very quickly. It could not
24 have happened that quickly had the parties not been engaged in
25 extraordinarily intense pre-bankruptcy negotiations the week

1 before. So the fact that there was a bankruptcy filing and a
2 changed transaction is certainly very significant. But if
3 Barclays had come in fresh that week, there hardly could have
4 been a transaction consummated within four or five days.
5 That's just not humanly possible. So I think that there is a
6 connection to what, at least in my mind, to what happened pre-
7 bankruptcy and what happened post-petition and I'm certainly
8 interested in knowing about it.

9 MR. THOMAS: Very well, Your Honor.

10 THE COURT: Okay. After that comment from the bench,
11 I'm not sure if anybody wants to say anything more.

12 I'm prepared to grant this motion for the reasons that
13 I've articulated. In doing so, however, I recognize that this
14 is a matter which is delicate because it goes to the heart of
15 institutions in the United Kingdom and confidential --
16 potentially confidential work papers of PwC and potentially
17 confidential internal records of the FSA. I leave it to the
18 High Court to determine issues of relevance, the
19 appropriateness of the discovery and will be guided entirely by
20 what the U.K. court decides. In authorizing this opportunity
21 to obtain discovery in the U.K., I by no means mean to suggest
22 anything about how a U.K. court should decide the issue once
23 it's presented there. So all issues that have been raised here
24 by Barclays can be raised there by PwC, FSA and Barclays and a
25 U.K. judge can decide whether or not the discovery is

1 appropriate. Anything more?

2 MR. TECCE: Your Honor, I do have just one point and I
3 apologize for this. In one of their requested documents we had
4 misstated a date, Number 5, of the FSA's request. The date
5 should be 19 September instead of 22 September. So if we --
6 when we submit a form of order to the Court electronically, we
7 were going to make that change.

8 THE COURT: If it's simply changing a typographical
9 error I assume there's no controversy.

10 MR. THOMAS: No, Your Honor.

11 THE COURT: Fine.

12 MR. TECCE: Thank you very much, Your Honor.

13 THE COURT: There are three matters from this
14 morning's calendar that I adjourned to the afternoon, so
15 anybody who wants to come up to hear the bench ruling Banesco
16 Banco Universal and PB Capital, this is a time to do that.

17 (Pause)

18 THE COURT: It's lonely up here.

19 UNIDENTIFIED SPEAKER: I represent Pacific Life; it's
20 very lonely up there.

21 THE COURT: The Court will read into the record a
22 ruling with respect to the late filed claims of Banesco Banco
23 Universal and PB Capital. As I indicated during this morning's
24 calendar, I've given active consideration to the Pacific Life
25 Insurance Company matter which is of a somewhat similar nature

1 but with some distinguishing facts and I'm simply not ready to
2 rule with respect to Pacific Life.

3 Like many aspects of the Lehman bankruptcy,
4 establishing a bar date in these cases was an unusually complex
5 exercise. The debtors' bar date motion at Docket Number 3654
6 was contested by a multitude of parties including the holders
7 of certain debt securities issued by or guaranteed by the
8 debtors. These objectors questioned the requirement that they
9 file both proofs of claim and guarantee questionnaires.
10 Ultimately, the parties reached an agreement and the Court
11 entered the bar date order at Docket Number 4271 establishing
12 two separate deadlines. The general bar date for claims, which
13 is September 22, 2009, and a later date known as the securities
14 bar date on November 2, 2009 for claims identified on the final
15 version of the Lehman Programs Securities List as of July 17,
16 2009 at 5 p.m.

17 The bar date order specified that only those
18 securities in the final version of the Lehman Programs
19 Securities List would be entitled to the later bar date. The
20 Lehman Programs Securities List was the result of a
21 collaborative process that ultimately produced a final version
22 of that list setting forth 6,744 securities that were subject
23 to the later securities bar date. But importantly for the
24 current dispute, this list did not include Banesco's or PB
25 Capital's securities. The Lehman Programs Securities List

1 never included the claim of Pacific Life.

2 Bankruptcy Rule 3003(c) allows the bankruptcy court to
3 set a bar date after which proofs of claim may not be filed.
4 Bankruptcy Rule 9006(b)(1) gives a bankruptcy court discretion
5 to enlarge the time to file claims where the failure to act was
6 the result of excusable neglect.

7 Excusable neglect is an equitable determination that
8 requires consideration of all relevant circumstances
9 surrounding a claimant's omission. Pioneer Investor (sic)
10 Services v. Brunswick Associates, LP 507 U.S. 380 at 395 (1993)
11 is the leading case in this area. The Pioneer Court noted four
12 factors that should be considered in analyzing excusable
13 neglect. These factors are: The danger of prejudice to the
14 debtor, the length of the delay and its potential impact on
15 judicial proceedings, the reason for the delay including
16 whether it was in the reasonable control of the movant and
17 whether the movant acted in good faith.

18 The Second Circuit has adopted what has been
19 characterized as a hard line in applying this Pioneer test. I
20 cite to the case of Midland Cogeneration Venture Limited
21 Partnership v. Enron Corp. 419 F.3d 115 at 122 (2d Cir. 2005).
22 This hard line focuses heavily on the reason for the delay and
23 specifically whether the delay was in the reasonable control of
24 the movant. The other factors which generally favor the party
25 seeking the extension become more relevant in close cases. The

1 Court will apply these factors in considering each of the
2 movant's circumstances. I'll start with Banesco.

3 On October 31, 2009, Banesco filed its motion seeking
4 that this Court deem its claim timely filed under a theory of
5 excusable neglect or add the Banesco note to the Lehman Program
6 Securities list.

7 The Banesco claim is for a note in the amount of 15.5
8 million dollars. The Banesco note is a structured security and
9 is similar to many of the securities on the Lehman Program
10 Securities list. Banesco believed that because of the nature of
11 the Banesco note and its similarity to many of the securities
12 listed on the Lehman Program Securities list, including three
13 other securities Banesco owned that were included on the final
14 list, it too was subject to the November 2, 2009 securities bar
15 date. However, this particular security was not on the list
16 and any claim for that note had to be filed by September 22,
17 2009. Banesco filed a proof of claim for the Banesco note
18 prior to the securities bar date.

19 The debtors, joined by the official creditors'
20 committee, object to Banesco's motion. The debtors challenge
21 Banesco's assertion of excusable neglect and argue that Banesco
22 and its counsel were aware of the Lehman Program Securities
23 list and that the bar date order clearly provided that only
24 securities on the final version of that list were subject to
25 the securities bar date. The failure to timely file was simply

1 a failure to follow the directions relevant to the bar date
2 order.

3 The debtors concede that the length of delay in
4 Banesco's late file claim is minimal and that there was no bad
5 faith when it filed its motion. Accordingly, the Court will
6 focus on prejudice and the reason for the delay.

7 The prejudice factor calls for consideration of the
8 size of the claim in relation to the estate whether a
9 disclosure statement or plan has been filed and the disruptive
10 effect permitting the late claim would have on plan
11 formulation. In re Keene Corp 188 B.R. 903 at 910 (S.D.N.Y
12 1995).

13 I this case, each of the prejudice factors favor
14 Banesco. The claim of 15.5 million dollars is objectively
15 large, but in reality is an insignificant percentage of the
16 total claims filed against the debtors. The debtors are not
17 ready to file a plan or disclosure statement and allowing this
18 claim will not disrupt the plan formulation process. Moreover,
19 the claim in question was filed before the November 2nd
20 deadline for listed securities claims.

21 The debtors also assert that allowing claims such as
22 Banesco's will result in the proverbial flood of similar late
23 claims. This is not a foreseeable risk. Banesco believed,
24 incorrectly as it turns out, that its claim was subject to the
25 securities bar date. It filed a proof of claim before that

1 date. This fact alone distinguishes it from other late filed
2 claims and the class of other claimants that could make a
3 similar credible plea for the exercise of discretion by the
4 Court must be an extremely limited group of potential
5 creditors. The Court therefore finds that the prejudice factor
6 weights in favor of Banesco.

7 The reason for the delay is the most important factor
8 in this circuit. In re Enron 419 F.3d at 122. A creditor
9 seeking to file a late claim must explain the circumstances
10 surrounding the delay in order to supply the Court with
11 sufficient context to fully and adequately address the reason
12 for delay factor and the ultimate determination of whether
13 equities support the conclusion of excusable neglect. In re
14 Enron Creditors Recovery Corp. 370 B.R. 90 at 103 (S.D.N.Y.
15 2007) citing to Pioneer.

16 Here, Banesco claims that it wrongly believed that the
17 Banesco note was subject to the securities bar date. Banesco
18 attached to its motion a declaration by its counsel, the
19 attorney who was responsible for filing its proof of claim who
20 indicated his reasons for the mistake. The Banesco note was a
21 structured security that is similar to many of the securities
22 on the Lehman Program Securities list. Additionally, the
23 Banesco note did not have a CUSIP or ISIN number that would
24 assist in identifying whether it was one of the many thousands
25 of securities subject to the later bar date.

1 The bar date order established two different bar dates
2 for different types of claims. The reason for Banesco's delay
3 is not merely a failure to comply with a clear bar date or a
4 simple missed deadline situation, Banesco neglected to
5 determine the proper bar date for the Banesco note but acted
6 properly based on its own erroneous beliefs. The reason for
7 the delay does fall on Banesco to some extent. But the
8 complexity of the claims, the dual nature of the bar dates
9 here, the international aspects of these cases all mitigate
10 responsibility for the error.

11 The decision to permit a late file claim is ultimately
12 based on equity. Guided by the Pioneer court and the Second
13 Circuit's ruling in In re Enron, the equities here favor
14 deeming Banesco's claim timely filed. There is minimal, if
15 any, prejudice to the debtors and no appreciable risk of a
16 multitude of similarly situated claims. There is no issue
17 regarding the length of the delay or Banesco's good faith. And
18 while the reason for the delay may be chargeable more to
19 Banesco than to any other party, the relief afforded by Rule
20 9006(b)(1) exists for this very type of circumstance.
21 Accordingly, a balancing of the equities favors Banesco and the
22 Banesco proof of claim will be deemed timely. I'll next turn
23 to PB Capital.

24 On October 22, 2009, PB capital filed its motion
25 seeking to have this Court deem four if its claims timely filed

1 under a theory of excusable neglect or to add the PB securities
2 to the final version of the Lehman Program Securities list.

3 The PB Capital claims are for four securities totaling
4 270 million dollars. The PB securities are a series of
5 financial guarantee linked notes due in 2/20/27 that were
6 issued under the Euro Medium Term Note Program. Like the
7 Banesco note, the PB securities are similar to many of the
8 securities in the Lehman Program Securities list. In fact, the
9 PB securities were included on the initial version of that list
10 on July 6, 2009 but were removed from the final version of that
11 list published on July 17, 2009. Accordingly, because the
12 securities were not on the list as of July 17, 2009, the PB
13 securities were not eligible for the later bar date.

14 PB Capital asserts that it believed the PB securities
15 were on the final version of the Lehman Program Securities list
16 and would be subject to the later securities bar date. PB
17 Capital did not file a timely proof of claim prior to the
18 general bar date, but did file a proof of claim on or before
19 the securities bar date.

20 The debtors objected to PB Capital's motion on
21 substantially the same grounds as they did for the Banesco
22 motion. The debtors challenge PB Capital's assertion of
23 excusable neglect mirroring their objection to Banesco. They
24 argue that PB Capital and its counsel were aware of the initial
25 and final versions of the Lehman Program Securities list and

1 that the bar date order clearly provided that only securities
2 on the Lehman Program Securities list were subject to the
3 securities bar date. The failure to timely file was simply a
4 failure to check the final list and follow the plain directions
5 of the bar date order. The debtors again concede that the
6 length of delay and PB Capital's late filed claim is minimal
7 and that there was no bad faith when it filed its motion.

8 For substantially the same reasons applicable to
9 Banesco, the equities favored deeming PB Capital's claim timely
10 filed. There is minimal prejudice because PB Capital timely
11 filed its claim prior to what it believed was the correct bar
12 date.

13 Turning to the reason for the delay, PB Capital's
14 claim is, perhaps, even more compelling than Banesco's. The PB
15 securities were on the initial version of the Lehman Program
16 Securities list. And while it is not disputed that they were
17 removed from the final version two weeks later, PB Capital's
18 mistake is understandable.

19 Permitting these claims will result in no prejudice to
20 the debtors and no foreseeable risk of multiple similar late
21 filed claims. The length of delay was minimal and there was no
22 bad faith. As in Banesco's case, PB Capital is responsible for
23 the error but it is not the result of mere inattention or
24 inadvertence. PB Capital failed to pay enough close attention
25 to changes made in the list of the securities. On balance, the

1 equities favor PB Capital and accordingly the PB security --
2 the PB Capital proof of claim will be deemed timely filed.
3 That's the ruling of the Court.

4 On the Pacific Life motion which was heard at the same
5 time, I guess the troublesome news is that I haven't been able
6 to reach the same result and I'm not sure what result I'm going
7 to reach or when I'm going to reach it. Suffice it to say,
8 that in exercising judgment here and attempting to apply the
9 strict Pioneer factors as recently interpreted in the Second
10 Circuit, the so-called hard line approach, it becomes more
11 difficult but not yet impossible for me to find that the delay
12 is properly excusable. As to that matter, it will continue to
13 be under advisement and at an appropriate I'll advise counsel
14 when I'll be prepared to make a ruling.

15 I believe that concludes today's calendar unless
16 there's anything more?

17 UNIDENTIFIED SPEAKER: Your Honor, would it be
18 allowable or okay if I spoke just for a moment on Pacific Life
19 or is this not the time and place? Less than two minutes but
20 if this is not the time and place then I'll hold off.

21 THE COURT: I think it's not the time and place.

22 UNIDENTIFIED SPEAKER: Fine.

23 MR. LEMAY: Your honor, David LeMay from Chadbourne &
24 Parke for Banesco. Of course, thank you. I rise only to say
25 we have an order, if the Court desires it or we can submit it

1 electronically, I just didn't want to walk out of here without
2 taking care of that. The form of order we did have to revise
3 slightly to take out some surplus language that was in the form
4 that we filed with the motion. If Your Honor would like me to
5 hand it up I can do that, I can send it along; whatever the
6 Court would likely be guided by.

7 THE COURT: Well, the bench ruling sort of stands for
8 itself but I will entertain orders both from counsel for
9 Banesco and counsel for PB Capital and suggest that those be
10 submitted to chambers.

11 MR. LEMAY: We'll do that, Your Honor.

12 THE COURT: Okay. Thank you. We're adjourned.

13 (Proceedings concluded at 3:39 PM)

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I N D E X

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C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true
and accurate record of the proceedings.

Clara Rubin

AAERT Certified Electronic Transcriber (CET**D-491)

Veritext

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Date: December 18, 2009